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**REPORTS OF CASES**

HEARD AND DETERMINED IN THE

**APPELLATE DIVISION**

OF THE

**S U P R E M E C O U R T**

OF THE

**STATE OF NEW YORK.**

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**JEROME B. FISHER, REPORTER.**

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**VOLUME CLXXXI.**

1918.

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**J. B. LYON COMPANY,  
ALBANY, N. Y.**



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# Justices

OF

THE APPELLATE DIVISION OF THE SUPREME COURT.

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\* Designated by the Governor to sit temporarily.

† Resigned December 31, 1917.

‡ Designated January 1, 1918, in the place of Hon. Albert H. Sewell, whose term of office expired December 31, 1917.

Every tenth volume of Hun's Reports from vol. 20 to vol. 90, and every tenth volume of Appellate Division Reports from vol. 10 to vol. 70 contains a Table of the Causes, published in Hun's Reports, which have been passed upon by the Court of Appeals.

Volume 100 App. Div. contains a table collecting all the causes published in the Appellate Division Reports passed upon prior to the issue of that volume.

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JEROME B. FISHER,  
*Reporter.*



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The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in or dissented from the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.) — [REP.]



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At a term of the Appellate Division, First Department, held on December —, 1917, the Rules of said Department were amended by adding thereto the following Special Rule, to take effect immediately:

**SPECIAL RULE.**

Engagement by the permanent and associate members of the Legal Advisory Board of the City of New York and the members of the several local boards and the government appeal agents in the work of assisting in the preparation of the Questionnaire and classification under the Selective Service Law and Regulations adopted thereunder is regarded as necessary public service.

Actual engagement by counsel in said work shall be accepted as a legal and sufficient excuse for adjournment of cases in all courts within the First Department until the said Legal Advisory Board shall certify to this court that the work of such boards under said law is completed.

Proof by affidavit of such engagement shall be presented when possible to the clerk prior to the appearance of the case on the Day Calendar.

Dated, December 12, 1917.

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At a term of the Appellate Division, Second Department, held on December 14, 1917, the Rules of said Department were amended by adding thereto a Special Rule bearing date December 13, 1917, to take effect immediately:

**SPECIAL RULE.**

Engagement by the permanent and associate members of the Legal Advisory Board of the City of New York and the members of the several local boards and the government appeal agents in the work of assisting in the preparation of the Questionnaire and classification under the Selective Service Law and Regulations adopted thereunder, is regarded as necessary public service.

Actual engagement by counsel in said work shall be accepted as a legal and sufficient excuse for adjournment of cases in all courts within the Second Department until the said Legal Advisory Board shall certify to this court that the work of such boards under said law is completed.

Proof by affidavit of such engagement shall be presented when possible, to the clerk prior to the appearance of the case on the Day Calendar.

This rule is applicable to the Supreme Court, and also will be applied by this court in appeals involving this question.

**Cases**  
**DETERMINED IN THE**  
**APPELLATE DIVISION**  
**OF THE**  
**SUPREME COURT**  
**OF THE**  
**State of New York.**

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**ALBERT A. MOERS, Appellant, v. " JANE " PELL, First Name Fictitious, Real Name Being Unknown to Plaintiff, Doing Business under the Firm Name and Style of WAMPAGNE KENNELS, Respondent.**

First Department, December 7, 1917.

**Pleading — action for breach of contract to care for dog — allegations as to negligence of defendant — complaint stating single cause of action — election.**

A complaint which in substance alleges that the defendant agreed for a consideration to breed a valuable dog owned by the plaintiff and to skillfully care for, and return, the dog in the same condition of health as when delivered, but that the defendant returned the dog suffering from distemper caused solely by the negligence of the defendant in the care of the dog, etc., whereby the plaintiff has been required to expend moneys in the treatment and maintenance of the dog, which has become worthless, states but a single cause of action for damages for breach of contract. The charge of negligence in the care of the dog is merely a specification of the breach of contract.

Allegations in respect to different theories upon which it is claimed that the defendant was guilty of a breach of duty under the contract do not set out different causes of action, nor do they involve different theories between which the plaintiff could be required to elect.

**APPEAL by the plaintiff, Albert A. Moers, from an order of the Supreme Court, made at the New York Special Term and**  
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entered in the office of the clerk of the county of New York on the 17th day of October, 1917, granting defendant's motion for an order compelling plaintiff either to amend his complaint by setting forth a cause of action either in tort or for breach of contract and to strike out all allegations in the complaint inconsistent therewith, or to elect as to which of the two inconsistent causes of action, namely, tort or breach of contract, he will proceed with, and to strike out all allegations in the complaint inconsistent with the one chosen, or to separate and number his two alleged causes of action.

*Robert Moers*, for the appellant.

*W. H. Dannat Pell*, for the respondent.

LAUGHLIN, J.:

Appellant claims that but a single cause of action is pleaded. Plaintiff alleges that on the 25th day of February, 1917, an agreement was made between him and the defendant whereby, in consideration of twenty dollars paid to her by the plaintiff, defendant agreed to breed a certain valuable female dog owned by the plaintiff and to skillfully care for and return the dog in the same condition of health as when delivered to her; that the dog was delivered to defendant in an healthy and sound physical condition, but that the defendant did not return her in the same condition and that when returned she was suffering from a disease known as distemper which was caused solely by the negligence of the defendant in her care and treatment of the dog and in her failure to keep the dog in a clean condition and in surroundings free from contact with germ infection; that the plaintiff by reason of the premises has been required to expend large sums of money in the care, treatment and maintenance of the dog and that, owing to said disease, the dog has become worthless, to plaintiff's damage in the sum of \$700.

I am of opinion that these allegations state but a single cause of action for damages for breach of the contract. The charge of negligence in the care of the dog is merely a specification of the breach of contract. There could be no recovery for negligence in caring for the dog but for the fact that the defendant was under a contract obligation requiring care. It

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may perhaps be said that the plaintiff alleges two theories upon which he claims to be entitled to recover for the breach of the contract, namely, that the defendant undertook absolutely to return the dog in the same condition as when received and that it was also the duty of the defendant to properly care for the dog and that she failed so to do in that she negligently, that is, by not exercising the care required by the contract, permitted the dog to contract the disease. But in either case the basis for a recovery would be the breach of contract and that, therefore, is the cause of action. Mere allegations with respect to the different theories upon which it is claimed there was a breach of the defendant's duty under the contract is not stating different causes of action; nor are the theories pleaded inconsistent, and, therefore, even upon the trial the plaintiff could not be required to elect between them, but may recover on any pleaded theory of the breach of the contract shown by the evidence. (*Payne v. N. Y., S. & W. R. R. Co.*, 201 N. Y. 436; *Schoenfeld v. Mott Ave. Realty Co.*, 168 App. Div. 91; *Snell v. Cornwell*, 93 id. 136.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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MORRIS MAY, Respondent, Appellant, v. HETTRICK BROTHERS COMPANY, Appellant, Respondent.

First Department, December 14, 1917.

**Partnership — agreement creating joint adventure — agreement to share profits received from sale of goods to foreign government — mutual duties of coadventurers and agents — secret sale made to detriment of coadventurer — liability to account for profits.**

Suit to compel the defendant to account for a portion of moneys received by it as profits upon a contract. It appeared that the defendant and the plaintiff's assignor had entered into an agreement whereby, if the assignor

procured for the defendant a contract to manufacture and deliver tents to a foreign government, the assignor was to receive a certain share of the profits, and the defendant further agreed that it would act only through the plaintiff's assignor and would not approach the proposed purchaser in any other way. The assignor having negotiated said sale with an agent of the foreign government and the substantial terms of the sale being settled, except as to a minor detail, the defendant, in violation of its agreement with the assignor, secretly negotiated a sale to the foreign government on its own behalf and furthermore agreed to give to the agent of the foreign government a rebate on the sums received for the tents. Evidence examined, and *held*, to sustain a decree requiring the defendant to account.

The defendant's corrupt agreement to give a rebate to the agent of the foreign government was an act which discredited the testimony of all persons who participated therein.

The defendant and the plaintiff's assignor, although not principal and agent strictly speaking, occupied an analogous relation which required a duty of utmost good faith and required the defendant to refrain from obstructing the negotiations between the assignor and the purchaser.

Copartners, joint adventurers and agents owe the duty of utmost good faith and fidelity to their copartners, coadventurers and principals and they are accountable for any secret profits that they have made whether within or in excess of their authority.

Moreover, until such relationship is terminated a copartner, or joint adventurer, cannot act for himself.

The above rules hold although under the agreement between the defendant and the plaintiff's assignor they were not interested in the same identical portion of the profit.

The defendant should be required to account to the plaintiff on the basis of its proposed contract with the plaintiff's assignor for the difference between the amount it was to receive under that contract and the amount it received under the contract with the purchaser.

SCOTT and DOWLING, JJ., dissented, with opinion.

APPEAL by the defendant, Hettrick Brothers Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of June, 1916, upon the decision of the court after a trial at the New York Special Term.

The judgment required the defendant to account to plaintiff for part of the moneys received or to be received by it under a contract in writing, bearing date December 11, 1914, between it and George Panagoulapoulos.

Appeal by the plaintiff, Morris May, from so much of said judgment as limits the scope of the accounting.

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First Department, December, 1917.

*Frederick N. Van Zandt* [*Joseph A. Burdeau* with him on the brief], for the appellant, respondent.

*Benjamin G. Paskus* [*Jacob Scholer* with him on the brief], for the respondent, appellant.

LAUGHLIN, J.:

By the contract defendant agreed to furnish and deliver f. o. b. dock, New York city, 100,000 individual shelter tents intended for the Serbian government. The action is on a claim assigned by the A. B. Kirschbaum Company which I shall refer to as the assignor.

The theory upon which the action was brought and the relief has been awarded is that the assignor and defendant became mutually and jointly interested in obtaining a contract at a specified price per tent from Panagoulapoulos, hereinafter designated the purchaser, running to the assignor, which was to be performed by defendant at a lower specified price per tent, payable from the moneys to be received by the assignor, so that the profits of each were to be separate and distinct; that while negotiations, in which defendant was cooperating pursuant to the agreement, were pending and nearly consummated between the assignor and purchaser, the defendant secretly took up the negotiations and obtained the contract in its own name, and that, therefore, it should account to the assignor to the extent of the interest the assignor was to receive if the contract had been awarded to it. The defendant appellant contends that no agency, copartnership or joint adventure has been shown and that it was within its rights in taking the contract. It also contends that some of the findings unfavorable to it are not supported by evidence or are against the weight of the evidence, and that in any event they do not sustain the interlocutory judgment.

We have examined the evidence and are of opinion that all findings made by the trial court are amply sustained thereby and that other findings more favorable to plaintiff should have been made; but we think that these made are sufficient to sustain the decree for an accounting and, therefore, do not deem it necessary to make additional findings.

The assignor was a Pennsylvania corporation having an office in New York and in Philadelphia and was engaged in manufacturing clothing, including military uniforms. During the Spanish-American War it manufactured tents for the United States government but discontinued that line of business. In November, 1914, it sent one Block, a salesman, to Texas to call on the brother of the purchaser, who represented him, with a view to obtaining an order for uniforms; and Block ascertained that the purchaser was desirous of placing an order for 150,000 or more tents and wired the Philadelphia office of his company to that effect. The assignor thereupon determined to endeavor to obtain the contract for the tents and shortly thereafter opened negotiations with the purchaser to that end, and on the sixteenth of November opened negotiations with the defendant with a view to having it perform the contract if obtained. Communications on the subject were had between the defendant and the assignor by telegraph, by telephone and by mail and finally the defendant sent a representative to assignor's Philadelphia office where he met and negotiated with its representatives. It was agreed between them for their mutual protection and profit that in the event the assignor obtained the contract defendant should manufacture and deliver the tents; that they would "tie up" together and that the defendant would make no other connections; and that the defendant would work with and through the assignor only and would not approach or in any manner connect with the purchaser whose name and the negotiations had with him were disclosed to defendant's representatives. With this understanding they negotiated the terms on which defendant, figuring the cost of manufacture and its own profit, would furnish and deliver the tents and reduce it to writing in the form of a proposal by defendant to the assignor. That was done to protect the assignor in quoting a price to the purchaser which would include the price to be charged by defendant and the compensation or profit to be received by the assignor. It was also provided in that proposal that if the assignor should be required to give a bond for performance the defendant would sign with it. The negotiations between the assignor and purchaser so far progressed that it expected

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that it would receive the contract and that the order would be increased by 100,000, and it requested defendant to send on a representative to attend the closing. Pursuant to the request two representatives of the defendant, Tische and Peters, called at the assignor's New York office on November twenty-eighth and were informed that the purchaser had let the contract for the 150,000 tents to another. On that day the representatives of the defendant and the assignor had an interview with the purchaser evidently with a view to ascertaining whether he was desirous of purchasing more tents, and Tische and Peters were introduced to the purchaser by one of the representatives of the assignor as expert tentmakers from its factory. The purchaser stated that he would soon be in the market for 100,000 more tents and it was agreed that the assignor should quote to him a price on them within a few days. Negotiations then followed between the assignor and defendant, owing to the changing market price of material, with respect to the price at which defendant would furnish the tents. During these negotiations defendant wrote to the assignor saying, among other things: "We hope you will be successful in landing this business, and we want to work with you so that WE BOTH get something definite out of it;" and in another letter it said: "We are in this game with you, and hope that we will hear favorably of the acceptance of our proposition." On the eighth of December the assignor notified defendant that it was ready to close the contract and requested that it send on a representative and that it would await his arrival before finally closing the contract. On December tenth Tische and Peters called at the assignor's office in New York where they met Aloe, the secretary and treasurer of the assignor, and May, its second vice-president, and Ellerman, who made estimates for it. The price to be charged by defendant, owing to changes in the dimensions of the tents, had not been agreed upon, but Tische and Ellerman thereupon agreed on a price of one dollar and seventy-four cents per tent. Defendant's representatives produced a sample tent which had a hem on only two sides, and on observing this Aloe stated that he had represented to the purchaser that the tents would have a hem all around. Aloe, May, Tische and Peters then went to the office of the assignor's

attorney and had contracts prepared for execution between it and defendant and it and the purchaser, and they were approved but not signed. The contracts thus prepared for execution with the purchaser referred to the sample tent as having been exhibited and approved and provided for the delivery of the tents f. o. b. on the dock in New York, boxed for export by delivery to a carrier at the assignor's factory, the place of which was not stated, within fourteen weeks — with a provision for an extension for four weeks longer — after the delivery to the assignor of a guaranty by the Irving National Bank that a sum of money sufficient to cover in full all payments to be made by the purchaser, and that it would pay the assignor on delivery of the bills of lading, and further provided that during the fourteen weeks the assignor should endeavor to make shipments at the rate of approximately 8,000 tents per week after the first four weeks, that deliveries should be deemed made at the factory, that the purchaser should take the risk of delay in transportation and that the assignor should give to the purchaser a surety company bond for \$30,000 for performance by it and should receive two dollars per tent. The contract prepared for execution between the assignor and defendant referred to the contract between the assignor and the purchaser and recited that defendant assumed the obligations of the assignor thereunder and would manufacture and deliver the tents in accordance therewith, and should be paid therefor *from the moneys received from said bank* one dollar and seventy-four cents for each tent; and that defendant should furnish a bond for \$26,000 guaranteeing performance. In the meantime a message by telephone was received from Block, who was with the purchaser at the Knickerbocker Hotel, and Aloe, May, Tische and Peters and Ellerman, who joined them, went there taking the drafts of the contracts with them or arranging to have them sent. On meeting the purchaser Aloe introduced Tische as the assignor's tentmaker. On the sample tent being shown to the purchaser he objected on the ground that the hem was on two sides only and insisted that it should be hemmed all around. This would make a difference in the price of manufacture, according to the testimony of Tische, of eighteen cents per tent. A general discussion then took place between

the parties, the plaintiff's representatives insisting that the contract had been negotiated with reference to the United States shelter tent, which was the sample, and the purchaser insisting that it was to be hemmed all around; and with respect to the additional cost of extending the hem all around. There is also testimony to the effect that the purchaser insisted upon a bond running to the Serbian government and that Aloe appeared to be willing to give such a bond but that May refused so to do. That, however, was controverted, and the testimony produced by the assignor is to the effect that the only objection raised was with respect to the hem and the court so found. The testimony given in behalf of the defendant to the effect that there was a disagreement concerning the bond is quite improbable for the conditions of the bond were only to be for performance by the assignor of its contract to make and deliver to a carrier at the factory and such was the bond subsequently given by defendant. Whether the bond was to run to the purchaser or to the Serbian government, as did the bond given by defendant, was manifestly a matter of no consequence since the obligations were and were to be precisely the same. The testimony adduced on the part of the defendant is to the effect that the negotiations were broken off absolutely; but that adduced in behalf of the assignor, which was accepted by the trial court, is that at the suggestion of Tische, owing to the lateness of the hour, it was agreed that negotiations should be postponed until the next morning when they would be resumed. That interview was at the purchaser's room at the hotel. When the parties were leaving the room they met one Bartell, who had secured the first contract from the purchaser, going in, and Tische expressed fear that Bartell would get the contract and stated, in effect, that the assignor would lose the contract unless it acted promptly. Block called upon the purchaser next morning at the time agreed upon for resuming the negotiations and was informed that he had placed the contract with the defendant the night before. It appears that after the interview with the purchaser on the evening of December tenth, he and Tische and Peters met that night and negotiated a contract for the delivery by the defendant to the purchaser of the same number and class of tents, but hemmed all around,



for which the purchaser agreed to pay two dollars and seventy-five cents per tent, deliveries f. o. b. New York, within twelve weeks from the date of a guaranty to be furnished by the Irving National Bank, to the same effect as that provided for in the draft contract, as aforesaid, and providing that defendant should endeavor to make shipments at the rate of 12,000 tents per week after the lapse of four weeks from the signing of the agreement. The contract contained a provision giving the defendant, in the event of its inability to complete within the time specified, an additional period of six weeks instead of four as provided in said draft contract; and the purchaser agreed to deposit, not as in said draft contract in the Irving National Bank which in said draft contract and in the contract so negotiated that night was to give the guaranty, but in the National Bank of Commerce, a sum sufficient to cover the purchase price, and payments were to be made by the National Bank of Commerce on presentation of bills of lading; and the contract provided that the defendant should give a bond in the sum of \$25,000, which was \$5,000 less than the assignor had proposed, to the Serbian consul in New York as a guaranty of performance by it. The purchaser and defendant's representatives agreed upon and reduced to writing the terms of the contract that night and completed their negotiations about four o'clock in the morning, but they did not sign the contract. A contract, however, between the purchaser and defendant, under date of December eleventh, was signed by the parties on the fifteenth of December and it followed substantially the terms of the contract negotiated that night with the exception that it provided that the guaranty was to be given by the National Bank of Commerce, with which the money for the purchase of the tents was to be deposited and not by the Irving National Bank. The only testimony in the case is to the effect that the negotiations for the contract made that night between the purchaser and the defendant's representatives were opened by the purchaser. The trial court disbelieved the testimony and found that the negotiations were opened by defendant's representatives, one of whom had taken a room at the hotel. We fully agree with the learned trial justice on this point and are of opinion that the fair inference from the evidence

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is, as has been found, in effect, that defendant's representatives sought out and opened negotiations with the purchaser in behalf of defendant, for the purchaser testified that he supposed they were connected with the assignor until they informed him otherwise, when he finding that one of them had taken a room at the hotel called on them. If they went to him knowing that negotiations between him and the assignor were pending and to be resumed in the morning they could not, in the circumstances, take up and conclude the negotiations and give the defendant the contract without liability to the assignor regardless of whether or not they made any misrepresentations fraudulent or otherwise to the purchaser, and if the purchaser called on them to resume the negotiations in which he was led to believe they were representing the assignor, I think they were likewise precluded from taking advantage of their position and of the information acquired to negotiate a contract for defendant. It appears that on the date the final contract was signed between the defendant and the purchaser the defendant gave him a writing by which it agreed on the receipt of two dollars and seventy-five cents for each tent to remit to him or to any one designated by him the difference between the purchase price specified in the contract of two dollars and seventy-five cents and one dollar and ninety-five cents, being eighty cents for each tent, and that there was a parol agreement to the same effect the night the contract was negotiated; but it does not appear at whose suggestion this agreement thus to defraud the Serbian government was made. The making of such an agreement to rob a people already impoverished by famine and war discredited all who participated therein and yet it is repeatedly suggested in defendant's points that the purchaser was a disinterested witness whose testimony should have been accepted.

According to the credible evidence in the case, down to the time that negotiations for making the contract with the purchaser were thus secretly taken by the defendant's representatives out of the hands of the assignor, the defendant had agreed to furnish the tents, with the exception that they were to be hemmed all around instead of on two sides only, for one dollar and seventy-four cents per tent; and the

assignor was to receive the difference between that amount and the price to be paid by the purchaser which it was then expected would be two dollars per tent. The defendant had figured and included its profits in the price of one dollar and seventy-four cents per tent and the assignor for its time, trouble and expense was to receive the difference between that amount and the amount to be paid by the purchaser. The assignor, therefore, might have consented that the extra cost of eighteen cents per tent be taken out of its profits and thus have secured the contract and it would still have had a profit of eight thousand dollars. In view of the fraudulent contract made between the defendant and the purchaser by which the defendant was to give him the secret rebate the trial court evidently was in doubt with respect to whether or not the purchaser was to receive the entire amount of eighty cents per tent or whether he was to share part of it with defendant or its employees, and consequently in the interlocutory judgment it is provided, in effect, not that the defendant shall account to the plaintiff on the basis of one dollar and ninety-five cents per tent, but for the difference between the one dollar and seventy-four cents per tent plus the additional cost caused by any additional requirement in the contract executed between the defendant and the purchaser over and above the requirements of the draft contract, and the amount received or to be received by defendant.

There was here no agency, strictly speaking, but in a sense the defendant, in so far as it took part in the negotiations between the purchaser and the assignor, was acting in a capacity analogous to that of an agent and owed a duty of the utmost good faith and a duty to refrain from obstructing the negotiations between the assignor and the purchaser; and although defendant was not authorized to negotiate the contract for the assignor it was precluded from acting for itself in such manner as to deprive the assignor from obtaining the contract and became accountable to the plaintiff at its election precisely as an agent would have been accountable on the theory that the contract which the defendant thus negotiated with the purchaser is impressed with a trust in favor of the assignor. (*Trice v. Comstock*, 121 Fed. Rep. 620; *Patterson v. Meyerhofer*, 204 N. Y. 96; *Merrill v. Sax*,

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141 Iowa, 386; *Marvin v. Rogers*, 53 Tex. Civ. App. 423.) It is a well-settled rule that copartners, joint adventurers and agents owe the duty of utmost good faith and fidelity to their copartners, coadventurers and principals and that they are accountable for any secret profits that they have made whether within or in excess of their authority. (*Trice v. Comstock*, *supra*; *Merrill v. Sax*, *supra*; *Selwyn & Co. v. Waller*, 212 N. Y. 507, revg. 160 App. Div. 725; *Bain v. Brown*, 56 N. Y. 285; *Reis & Co. v. Volck*, 151 App. Div. 613; *Mitchell v. Reed*, 61 N. Y. 123; *Getty v. Devlin*, 54 id. 403.) It is also the settled law that until the copartnership is terminated or joint adventure is abandoned a copartner or joint adventurer cannot act for himself. (*Mitchell v. Reed*, *supra*; *Parks v. Gates*, 84 App. Div. 534.) In *Mitchell v. Reed* it was held that a copartner in taking a renewal lease of premises leased by the copartnership to take effect not only at the expiration of the copartnership lease, but also at the termination of the copartnership, would be deemed to hold it as trustee for the firm. It is sufficient to afford a consideration for an agreement with respect to a project in the nature of a joint adventure that services are rendered and it is not essential that money or other property shall be delivered to a coadventurer to require him to account. (*Peirce v. McDonald*, 168 App. Div. 47, 55; *Schantz v. Oakman*, 163 N. Y. 148, 157.) Here the object of the joint adventure was the procuring of the contract between the purchaser and the assignor and both the assignor and the defendant were jointly interested for the defendant was thereupon to receive its contract from the assignor. The fact that they were not interested in the same profit is, I think, quite immaterial as is also the fact that there might not have been a right of action by either against the other for an accounting had the project succeeded, for then the object of the joint adventure would have been accomplished and the profits of each would have been secured by separate agreements; and neither was to receive any profits unless the object of the joint adventure, namely, the obtaining of a contract from the purchaser, was accomplished. In legal effect, I think they were quite as much jointly mutually interested as if it had been expressly understood and agreed that the contract with the purchaser was to inure directly to the benefit

of both and that the assignor was to have as its share of the profits all received from the purchaser above one dollar and seventy-four cents per tent and the defendant was to receive as its profit the net profits of the manufacture at the price of one dollar and seventy-four cents per tent. That clearly would have constituted a joint adventure in which each was to render services and would have entitled the plaintiff to an accounting on the defendant's violating its duty and taking the contract itself. If we eliminate the difference between the terms of the two contracts and assume that the defendant, knowing that the negotiations were pending with a reasonable prospect of success, secretly opened negotiations with the purchaser and obtained the contract at one dollar and ninety-five cents per tent, thus securing to itself not only its own profit but the profit which the assignor would have received had the contract been made with the assignor on the resumption of negotiations, then, I think, it would also be quite clear under the authorities cited that it would be the duty of the defendant to account to the plaintiff on the basis of its proposed contract with the assignor for the difference between the amount it was to receive under that contract and the amount it received under the contract with the purchaser. If that be so then the case as presented must be governed by the same principle and needs merely the modification provided for in the interlocutory judgment to protect defendant against the additional cost over and above the cost of the material and labor involved in its proposed contract with the assignor. Each of the parties expended much time of its officials and employees and considerable money in the enterprise in which they had agreed to cooperate and I am of opinion that the court is not powerless in the circumstances to prevent the defendant from taking advantage of the confidential relations established between it and the assignor and secretly negotiating the contract for itself. I think it was competent for the court to decree, as it has done in effect, that the assignor was at liberty to claim the benefit of the contract which the defendant made with the purchaser and to require the defendant to account thereunder. This will give the assignor the benefit of the contract as if it had been made between it and the purchaser and will give the defendant the same benefit which

it would have received if it had contracted with the assignor on the basis that it offered to contract so far as that basis is applicable, or, in other words, to the extent that performance is the same under the contract which it made with the purchaser as under the contract which it was willing to make with the assignor. No precedent has been cited or found precisely in point on the facts, but it seems to me that this will be no undue extension of equitable principles. The case is quite analogous to *Patterson v. Meyerhofer* (*supra*), where it was held that one agreeing to buy from another who did not have title was under an implied agreement not to bid on a foreclosure and thus compete with the other party in obtaining title and prevent his obtaining it.

The plaintiff claims on its appeal that defendant should not be allowed the additional cost of hemming the tents all around and of any other items covered by its contract with the purchaser not embraced in the draft contract which defendant was ready and willing to sign with the assignor. I am of opinion that plaintiff is not entitled to a more favorable judgment. The defendant did not agree to furnish the tents, so far as the requirements differ under the contract which it negotiated with the purchaser from the draft contract, for one dollar and seventy-four cents. Upon no theory was the assignor entitled to participate in defendant's profits for throughout the negotiations defendant and it figured on separate profits. Therefore, to require the defendant to account to the plaintiff on the basis of one dollar and seventy-four cents per tent without any allowance for the additional cost referred to would be to give the plaintiff part of the defendant's profits; but to require the defendant to account, as the interlocutory judgment does, for the difference between one dollar and seventy-four cents per tent plus such additional costs gives the plaintiff the benefit of the contract which the defendant thus secretly negotiated with the purchaser in violation of its duty to the assignor. That is, I think, the only theory upon which the action can be sustained.

It follows, therefore, that the interlocutory judgment should be affirmed, with costs.

CLARKE, P. J., and SMITH, J., concurred; SCOTT and DOWLING, JJ., dissented.

SCOTT, J. (dissenting):

I dissent because I do not consider that any partnership or joint adventure was shown between plaintiff's assignor and defendant. They were not to share profits or losses. Plaintiff's assignor seeing an opportunity to sell a quantity of tents to the Serbian government, and having no facilities for manufacturing such tents itself, sought to obtain from defendant a figure at which the latter would agree to manufacture the tents as subcontractor. This was in order to enable plaintiff's assignor to fix a price for the delivery of the tents to the Serbian government so that it would be assured of a profit. In this profit defendant was to have no share. It was to manufacture the tents at a fixed price which it was to receive in any event, quite irrespective of the profit, if any, plaintiff's assignor might make. I can see none of the elements of a partnership or joint adventure in this arrangement. The defendant's action, as shown by the evidence, was scarcely such as can be considered strictly honorable, but "neither courts of equity or law sit to enforce mere moral obligations." (*Wood v. Rabe*, 96 N. Y. 414, 421.) Therefore, no case was made for an accounting in equity.

DOWLING, J., concurred.

Interlocutory judgment affirmed, with costs.

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MAX JAFFE and Others, Respondents, v. STEPHEN M. WELD, J. A. E. PYLE, as Trustee in Bankruptcy of STEELE, MILLER & COMPANY, and Others, Appellants.

First Department, December 21, 1917.

**Discovery — books and papers in foreign State in custody of trustee in bankruptcy — when production of papers in this State should not be required — practice — open commission.**

Where the books and papers of a bankrupt defendant are in the possession of the trustee in bankruptcy appointed by the Federal court in another State, the courts of this State should not order the trustee to bring the books and papers into this State and deposit them with the county clerk to be inspected by the plaintiff, irrespective of any jurisdiction of the court to make such order.

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The proper remedy of the plaintiff is an open commission to examine the trustee in the foreign State and have the books and papers produced and proved, and in case there should be an objection to the originals being returned here with the commission, to have copies annexed as provided by subdivision 3 of section 901 of the Code of Civil Procedure.

SEPARATE APPEALS by the defendants, Stephen M. Weld and others, and by the defendant J. A. E. Pyle, as trustee in bankruptcy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of November, 1917, granting an inspection and discovery of books and papers belonging to the defendant trustee and to the bankrupt estate.

*George S. Mittendorf* of counsel [*Geller, Rolston & Horan*, attorneys], for the appellants Stephen M. Weld and others.

*R. L. von Bernuth* of counsel [*Edward R. Greene and Coulter D. Young* with him on the brief], *Stetson, Jennings & Russell*, attorneys, for the appellant, J. A. E. Pyle, as trustee, etc.

*George T. Hogg* of counsel [*Davies, Auerbach & Cornell*, attorneys], for the respondents.

LAUGHLIN, J.:

The complaint in this action has been before this court four times on demurrer thereto (*Jaffe v. Weld*, 149 App. Div. 942; 155 id. 110; 169 id. 924; 175 id. 970); and has finally been sustained by the Court of Appeals as stating a good cause of action (*Jaffe v. Weld*, 220 N. Y. 443). Issue has now been joined on substantially all of the material allegations of the complaint by the service of separate answers by the appellants. In view of the opinions on former appeals, to which reference has been made, it is unnecessary to state the facts.

The action is brought to trace and follow into the hands of the trustee in bankruptcy and into the hands of Stephen M. Weld & Co. and the firm of Weld & Neville money alleged to have been fraudulently obtained from the plaintiffs by the bankrupt firm of Steele, Miller & Co., and for an accounting with respect thereto by the trustee in bankruptcy and by said other firms, and to impress a trust in favor of the plaintiffs on certain cotton and the proceeds thereof.

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The order for the inspection and discovery is with respect to books and papers in the custody or under the control of the trustee in bankruptcy who was duly elected, qualified and entered upon the discharge of his duties as such trustee on the 11th day of July, 1910, in the bankruptcy proceeding then pending in the United States District Court for the Northern District of Mississippi, Eastern Division, and all of said books and papers are in the State of Mississippi. It is evident that the inspection and discovery embrace records and entries with respect to substantially all of the essential facts upon which the right of the plaintiffs to recover depends. The trustee in bankruptcy is a non-resident and with respect to these books and papers is subject to the orders of the Federal court. He is required by the order to bring from the State of Mississippi and deposit with the county clerk here the books and papers in question upon payment by the plaintiffs of the actual expense of transportation.

Without passing upon the jurisdiction of the court to make the order we are of opinion that the proper remedy of the plaintiffs is a commission, and probably an open commission, to examine the trustee in Mississippi and have the books and papers produced and proved, and then if there be objection to the originals being returned here with the commission to have copies annexed as provided by subdivision 3 of section 901 of the Code of Civil Procedure. The court should be reluctant to make orders, compliance with which it is without power to enforce. Those interested in the bankrupt estate are doubtless interested in the preservation of these books and papers and it may well be that the Federal court would not permit the trustee to remove them from that jurisdiction. If so that would be an answer to any proceeding to punish him for contempt for not complying with the order. It is evident that there may be risks attending the removal of the books to which they should not be exposed.

The order should, therefore, be reversed, but without costs, and motion denied, without costs.

CLARKE, P. J., SCOTT, DOWLING and SHEARN, JJ., concurred.

Order reversed, without costs, and motion denied, without costs.

ABRAHAM I. SHAPIRO, Appellant, v. ROBERT BENENSON,  
Respondent.

First Department, December 14, 1917.

Principal and agent — broker's action for commissions — release of commissions earned in consideration of new contract of employment — breach of second contract — election of remedies — right to recover consideration released or for breach of second contract — rescission — tender — damages — failure to show purchaser for lands was willing and able to perform — nominal damages — appeal — reversal where plaintiff may be able to show substantial damage.

Where the plaintiff, having been employed as a broker to sell or exchange lands and having procured a person willing to exchange, agreed with his principal, the defendant, to release his claims for commissions in consideration of the defendant's agreement to make the plaintiff his sole selling agent for the lands to be taken in exchange and to give him as compensation the amount which the plaintiff might secure from purchasers over and above a stated amount, etc., but the defendant made a breach of his agreement by refusing to make the exchange with the person originally procured by the plaintiff, so that he was unable to convey the lands to purchasers subsequently procured by the plaintiff, the latter had an election either to disaffirm the second contract of employment and recover, or be restored to the consideration with which he parted on making it, that is to say, to the commissions earned under the first contract, or to recover damages from the defendant for a breach of the second contract.

There was nothing which the plaintiff was called upon to tender back on rescinding the second contract for he had received nothing thereunder, nor was it necessary for him to allege a rescission as the bringing of the action constituted an election.

Complaint examined, and *held*, sufficient to justify a recovery either upon the theory that the action was in disaffirmance of the second contract of employment by reason of the defendant's breach thereof and for the recovery of the consideration, or whether it be considered as an action for damages for the breach of the second contract.

But the plaintiff can only recover the commissions earned under the first contract of employment, which he released as a consideration for the second contract, where he elects to rescind the second contract, and where he brings an action for the breach of the second contract he affirms it and irrevocably elects to pursue his remedy for such damages for the breach of the second contract as he may be able to show and necessarily concedes that the defendant is entitled to retain the commissions earned under the first contract.

In order to recover for a breach of the second contract the plaintiff must show that he produced a customer for the lands which the defendant had agreed to take in exchange, who was ready, willing and able to purchase the same, and on failure of such proof he is not entitled to recover substantial damages.

But although the plaintiff, on the theory adopted at trial, is not entitled to recover substantial damages, he has established a right to nominal damages by proof of the defendant's breach of the second contract of employment, and while the appellate court will not reverse a judgment to enable a recovery of merely nominal damages, where a party entitled to such damages has not received the same and it can be shown that on a new trial he may be able to show substantial damages and that injustice may be done by allowing the erroneous decision to stand, the appellate court may reverse because of the error and give the plaintiff an opportunity to show and recover substantial damages.

APPEAL by the plaintiff, Abraham I. Shapiro, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Bronx on the 10th day of April, 1917, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case, and also from an order entered in said clerk's office on the 4th day of April, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*Eugene Cohn*, for the appellant.

*Anthony J. Romagna*, for the respondent.

LAUGHLIN, J.:

The plaintiff alleges that he was employed as a broker by the defendant to sell or exchange a parcel of land owned by the defendant for a commission of one per cent of the consideration on the sale or exchange; that he negotiated an exchange of defendant's premises with one Weisman and that the agreed value of the defendant's premises on the exchange was \$75,000. These facts were admitted by the answer. The plaintiff next alleged that the defendant thereupon became indebted to him for the sum of \$750. That allegation was denied, but such indebtedness necessarily followed from the facts alleged. The plaintiff further alleged that thereafter and on or about the 20th day of April, 1914, when the defendant and Weisman were about to execute the exchange of their respective properties, plaintiff and defendant made a

further agreement whereby plaintiff agreed to surrender and release his claim for commissions for negotiating the exchange in consideration of defendant's agreement then and there made to execute a contract for the exchange with Weisman and to perform the same by acquiring title to the parcels which Weisman was to convey to him and to constitute the plaintiff his sole selling agent for the premises for a limited period and to pay the plaintiff for his full compensation for the services theretofore rendered and thereafter to be performed the amount which the plaintiff might secure from the purchaser of one of the parcels over and above \$12,750, and of the other parcel over and above \$4,750, and that plaintiff and defendant executed agreements in writing to that effect. It is then alleged that plaintiff thereupon entered upon the performance of the second employment and within the time during which he was given the sole selling agency procured a purchaser for one of the parcels who was ready, willing and able to pay therefor the sum of \$14,000; and procured a purchaser for the other parcel who was ready, willing and able to pay therefor the sum of \$5,000; but that defendant failed to perform his agreement with the plaintiff in that he failed to perform his agreement with Weisman or to acquire title to the parcels to be exchanged by Weisman and thereby was unable to convey the same to the purchasers so secured by the plaintiff, and solely for that reason defendant failed to enter into contracts with the purchasers procured by plaintiff, to plaintiff's damage in the sum of \$1,500.

On the trial the plaintiff abandoned any claim for damages on account of defendant's failure to accept the purchaser plaintiff claimed to have procured for the parcel for which \$5,000 was to be paid. The plaintiff, however, showed that he negotiated a sale of the other parcel to one Seaver *for a builder* whose name was not disclosed and from the testimony of the plaintiff it is to be inferred defendant did not ask that it be disclosed. The plaintiff's testimony with respect to this sale is to the effect that he first received from Seaver and submitted to the defendant an offer for an undisclosed customer of \$14,000, forty per cent in cash, the balance to be secured by a second mortgage on the premises and buildings

to be erected by the customer; that this proposition was acceptable to the defendant, who, however, suggested that he obtain a *bona fide* offer from Seaver; that thereafter he obtained another offer in writing from Seaver, stating that his customer would be willing to take the parcel at \$14,000, and pay \$6,000 in cash and secure the balance by second mortgage on the premises, and that he presented this offer to the defendant on or about the date thereof, which was April 28, 1914, and that defendant accepted it, but requested, in effect, that he refrain from further negotiations until the defendant took title. It appears that the agreement between the defendant and Weisman was to be closed by the exchange of their respective premises on the fourteenth day of May. The plaintiff considered the two offers made by Seaver to be substantially the same, the only difference being that the second provided for a greater cash payment of \$400 than the first; and testified that he informed Seaver on obtaining the second offer that the former offer had been accepted by the defendant. On the thirteenth of May the plaintiff says defendant agreed to make the exchange with Weisman on the following day according to the contract for the exchange but failed to appear at the appointed time or to acquire Weisman's title and later and on the same day informed plaintiff that he did not intend to perform his contract with Weisman, or with plaintiff.

On defendant's breach of the second contract, in the circumstances, I think that plaintiff had an election either to disaffirm the contract and recover, or be restored to the consideration with which he parted on making it, namely, the commission earned by him under the first contract or to recover damages for a breach of the second contract. (*Graves v. White*, 87 N. Y. 463; *Loeb v. Goldsmith*, 176 App. Div. 747. See, also, *Dubois v. Delaware & Hudson Canal Co.*, 4 Wend. 285, 289; *Schneider v. Miller*, 129 App. Div. 197.) He had received nothing under the second contract which he was called upon to tender back on rescission and it would not have been necessary to allege a rescission for the bringing of the action would constitute a sufficient election. (1 Pom. Eq. Juris. [3d ed.] 117, § 110; 2 Black Rescission & Cancellation, § 576; 1 Abb. Tr. Br. Pl. 380; 2 id. 1833; *Bither v. Packard*,

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98 Atl. Rep. [Me.] 929; *Smith v. Smith*, 19 Ill. 349; *Laboyteaux v. Swigart*, 103 Ind. 596; 3 N. E. Rep. 373; *Mobley v. Pickett*, 9 Ala. 97.) If the plaintiff were proceeding on the theory of rescission and had actually parted with money as the consideration for the second contract, he would be entitled to recover as for money had and received; and it would not have been necessary to plead the source of title to the money or the circumstances out of which the indebtedness therefor arose (*Whiting v. Derr*, 121 App. Div. 239; *Drake v. White Sewing Machine Co.*, 133 id. 446; *Hanover Building Co. v. Jacobs*, 78 Misc. Rep. 410; *Hofferberth v. Duckett*, 175 App. Div. 480); but he did not actually deliver any money to the defendant and the action could not, strictly speaking, be maintained for money had and received, but rather for the consideration parted with, or perhaps it is more accurate to say that his original cause of action would thereby be restored. (See *Loeb v. Goldsmith*, *supra*.) I think there is no fact pleaded which might not have been properly, although perhaps not necessarily, alleged whether the theory of his action be in disaffirmance of the contract on account of the defendant's breach thereof and for the recovery of the consideration or whether it be for damages for the breach. In either case he could have alleged and proved, as he has, that he performed the contract on his part by endeavoring to obtain a purchaser until the time when the defendant refused to perform and abandoned the contract. On the facts alleged, therefore, I think plaintiff might have recovered on either theory; but the amount of damages demanded in the prayer for relief indicates that they have been estimated on the theory of full performance of the second contract and he did not demand as damages the amount of the commissions earned under the first contract. However, his counsel does not contend here and so far as the record shows did not claim on the trial that the action was brought on the theory of rescission. His contention is and has been that the plaintiff is entitled to recover damages as for a breach of the second contract, measured by the provisions of that contract if his evidence be sufficient, and he claims it is, to show a right to recover on the theory that he procured a purchaser for the one parcel who was ready, willing and able to perform,

and that otherwise, in any event, he is entitled to recover as for a breach of the contract the consideration with which he parted, on the theory that there has been a total failure of consideration owing to the defendant's breach of the second contract. Counsel for plaintiff argues, in effect, that his client could not rescind and become reinvested with his cause of action under the first contract; and on that point he relies upon *McCreery v. Day* (119 N. Y. 1) and *McIntosh v. Miner* (37 App. Div. 483), but they relate only to the effect of a rescission, by mutual agreement, of the original contract on which the action was based and not to a rescission of the contract which rescinded it; and this court, in *Loeb v. Goldsmith* (*supra*) recently held that the rescission for a total breach and abandonment of the second contract restored a right of action on notes surrendered by plaintiff in consideration thereof. It is persuasively argued by the learned counsel for the appellant that his client should be permitted to proceed on the theory of damages for breach of the contract and that, having pleaded all of the facts, in the event of his inability to show damages on the theory of full performance, he should be permitted to recover the consideration on the ground that defendant should be deemed estopped from contending that plaintiff has not sustained damages in that amount, at least, and he relies principally on *Horton v. Howe* (13 Hun, 57) and *Graves v. Waite* (59 N. Y. 156) in support of his contention. There is an expression in the opinion in *Horton v. Howe* which tends to support plaintiff's theory, but in that case the consideration parted with was fifty dollars and under the agreement that amount was to be returned to the plaintiff from the proceeds of the enterprise. The recovery was allowed on the ground that the defendant, having violated his contract by refusing to proceed as he had agreed, could not be heard to say that if he had performed as contemplated, the proceeds would not have enabled him to repay plaintiff therefrom. The case of *Graves v. Waite* (*supra*) apparently tends to sustain plaintiff's contention. That was declared by the Court of Appeals to be an action in assumpsit and appears to have been regarded as an action for breach of a contract to sell and deliver certain capital stock. The recovery was for the consideration paid, but

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there is no discussion in the opinion either with respect to remedy or damages which indicates that no point in regard thereto was presented for decision. There are many decisions relating to actions by a vendee for a breach of the contract to convey land and by a grantee for a breach of warranty in which, applying in part the rule applicable to rescission (Suth. Dam. [4th ed.] § 566), it has been held that ordinarily the amount recoverable is the consideration paid, together with interest thereon, and expenses incurred in examining title and preparing to perform; but in special cases where the vendor knew that he did not have title and the vendee did not, or that his title was defective, or where bad faith was shown, or where the contract was made with a view to enabling the vendee to reconvey a recovery has been had on a different basis. (Suth. Dam. [4th ed.] §§ 581, 582, 633; *Taylor v. Barnes*, 69 N. Y. 430; *Boyd v. De Lancey*, 91 Hun, 542; *Pumpelly v. Phelps*, 40 N. Y. 59; *Margraf v. Muir*, 57 id. 155; *Moore v. Williams*, 115 id. 586; *Goodman v. Wolf*, 95 App. Div. 522; *Pringle v. Spaulding*, 53 Barb. 17.) There are, however, other authorities, not cited by either counsel, more in point on the facts, which hold that the consideration parted with is only recoverable on the rescission of the contract and that by bringing an action for a breach of the contract the plaintiff affirms it and irrevocably elects to pursue his remedy for such damages for the breach as he may be able to show and necessarily concedes that the defendant is entitled to retain the consideration. (*Quinn v. Van Pelt*, 56 N. Y. 417; Suth. Dam. [4th ed.] § 656; Sedgw. Dam. [9th ed.] § 30.) This rule is also sustained by the decision in *Tompkins v. Lamb* (121 App. Div. 366; affd., 195 N. Y. 518), which was regarded as an action by a vendor for a breach of contract to deliver a monument for which he had paid in full. There the litigated question was whether plaintiff had accepted a monument of a different quality and the jury found that he had not, although he still had possession of it owing to the fact that the vendor refused to take it back, and the jury awarded him the difference between the value of the monument as it should have been and as it was delivered. The verdict was set aside by the trial court, but it was reinstated on plaintiff's appeal on the theory that the recovery had



been for a less amount than that to which plaintiff was entitled, but that of this defendant could not complain; and the true rule of damages was held to be that plaintiff was entitled to the *value* of his contract and that having paid the contract price and not having received the monument he was entitled to recover the full value of the monument as it should have been delivered. What was there said with respect to a recovery of the consideration is to be read in the light of these facts for, of course, if he had not paid the consideration his recovery should have been for the difference between the value of the monument agreed to be delivered and the contract price. (*Dey v. Dox*, 9 Wend. 129; *Clark v. Pinney*, 7 Cow. 681.)

The testimony of the plaintiff tends to show that he procured a customer for one of the parcels on terms satisfactory to the defendant and that the defendant verbally accepted the proposition and, in effect, released him from any obligation to produce the customer or to continue the negotiations further until after defendant acquired title to the land. The jury might have found that the defendant was alone responsible for plaintiff's failure to bring the customer to him, but there is no evidence from which they could have found that the customer was ready, willing and able to perform. The equities appear to be with the plaintiff and particularly since, if these views are right, he is now precluded from recovering the consideration. Such cases are apt to sway courts to extend doctrines unwisely. If the evidence should be held sufficient to warrant a recovery for the difference between the amount the purchaser offered for the parcel and the amount defendant agreed to take therefor, namely, \$1,250, the recovery would necessarily proceed upon the theory that but for the defendant's breach of the contract the customer procured by plaintiff would have performed. On these facts it will not do, I think, to indulge in presumptions to that extent. A ruling to that effect might result in a recovery where the customer was wholly irresponsible financially and would not and could not have paid the consideration. It is to be borne in mind that the plaintiff was to receive any amount over and above \$12,750 which he obtained for this parcel. It was doubtless contemplated that the payment

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would be made through the defendant but he was only obligated to pay on receiving the consideration from the purchaser or the equivalent thereof. I am of opinion, therefore, that it was incumbent upon the plaintiff, in order to recover those damages to go further and to show that his customer was ready, willing and able to perform and thus afford a basis for a recovery on the theory that it was reasonably certain that if it had not been for defendant's breach of the contract the plaintiff would have received \$1,250 for his services in negotiating a sale of one of the parcels. (See *Bunnell v. Chapman*, 173 App. Div. 108; *Corbin v. Mechanics & Traders' Bank*, 121 id. 744; *Mutchnick v. Davis*, 130 id. 417; *Backer v. Ratkowsky*, 137 id. 559; *Sheridan v. McLaughlin*, 172 id. 314.)

The defendant's wrongful breach of the contract has placed the plaintiff in an unfortunate position. His rights then became fixed and he was called upon to make an election whether to abandon the fruits of the contract and by rescinding recover the consideration or whether to stand upon the contract and endeavor to recover on the theory of performance with respect to one or both parcels. The time which he was to have to negotiate the sales had not expired; but when defendant refused to take title or to be bound by either contract the plaintiff could not in good faith endeavor further to obtain a purchaser. The nonsuit cannot be reversed on any theory argued on the appeal, but I am of opinion that it may and should be reversed on another ground. The action is one at law and a breach of the contract was shown as alleged and, therefore, plaintiff became entitled to recover nominal damages at least. Appellate courts do not reverse judgments to enable a recovery of merely nominal damages; but where a party was entitled to and has not received nominal damages and it can be seen that he may be able on a new trial to show substantial damages, and that an injustice may be done by allowing the erroneous decision to stand, it is within the power of an appellate court to reverse for the error and thus afford the plaintiff an opportunity to show and recover substantial damages. (*Thomson-Houston Electric Co. v. D. L. I. Co.*, 144 N. Y. 34, 49; *Mortimer v. Otto*, 206 id. 89; *Stevens v. Amsinck*, 149 App. Div. 220, 229.)

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SCOTT, DOWLING and SMITH, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to appellant to abide event.

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FRED FORD, Respondent, v. FORD MOTOR COMPANY, Appellant.

Third Department, December 28, 1917.

**Contract — agreement of manufacturer to share profits with purchasers of its product — purchaser entitled to profit on fulfillment of conditions — contract between purchaser and selling agent does not bar recovery.**

Where the defendant, a manufacturer of automobiles, for the purpose of giving publicity to its products, advertised that it would give to all retail buyers of its automobiles a certain share of its profits during the current year, providing the defendant sold a certain number of cars, one who purchased an automobile from an agent of the defendant, or the purchaser's assignee, is entitled to receive a share of the profits, the conditions of the advertisement having been fulfilled, and payment cannot be refused upon the ground that the bill of sale of the car given by the agent some months after the actual sale stated that the sale did not come within the provisions of the defendant's offer. The agreement of the defendant through its advertisement was an entirely different transaction than the sale of the car between the purchaser and the agent. Said promise of the defendant to divide profits was not a mere gratuity, but a request to the public which, when acted upon, was binding.

APPEAL by the defendant, Ford Motor Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Tioga on the 9th day of November, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on or about the same day denying defendant's motion for a new trial made upon the minutes.

*Clark & Truman* [*James S. Truman* of counsel], for the appellant.

*Lynch & Clifford* [*Edward W. Clifford* of counsel], for the respondent.

**PER CURIAM:**

We see no reason for changing our views in this case except as to the fifty dollars on the profit-sharing plan. The court overlooked the fact that the bill of sale was delivered some four months after the delivery of the car and long after the purchaser had paid the agent and the agent had paid the company for it. The statement stamped upon the bill of sale giving a reason for attempting to exclude the purchaser from the profit-sharing plan was not true. The car was a new car and sold at the regular price.

It is urged that the profit-sharing plan was not referred to in the contract of sale which recites that it contains the whole agreement, and that it cannot be changed by any other understanding. The defendant issued a circular to the public, signed by it, in part as follows: "Now, with the single provision that we sell 300,000 cars, we propose to give to all retail buyers of Fords, between August 1, 1914, and August 1, 1915, between twelve and eighteen millions of dollars to be distributed at the end of the selling year August 1, 1915." The number of cars was sold and, under the plan of distribution, each purchaser was entitled to fifty dollars as his share of the profits of the business. This profit-sharing plan did not relate to the contract of sale, as the contract was complete in itself and related only to the sale of the car and the price to be paid, which agreement has been fully executed. The fifty dollars was not intended as a reduction of the price of the car, but as part of an advertising scheme by which each customer during the time became an active barker interested in the sale of Fords during the year. It related to an entirely different matter from the sale of a car — namely, to the distribution of the profits in which the defendant agreed that the public interested in Fords should share. The terms of exclusion in the contract of sale relate only to terms which qualify or change the writing itself; but the contract was made with special reference to the profit-making plan, which was known to both parties and did not reduce the price of the car or change the terms of sale but was a publicity scheme adopted by the defendant to give it assistance in selling its cars. The profit-sharing plan related to an entirely different subject from the sale of this particular car. The defendant

undoubtedly had the active assistance of more than 300,000 purchasers in making its profits for the year; it should now treat them in good faith and divide the profits with them as agreed. The plan was not a mere gratuity, but was a request to the public which, when acted upon, binds the company.

Proof of the plan and of the acceptance of it by plaintiff's assignor does not change the contract of purchase and was, therefore, competent.

It is alleged there was an error in refusing a request to charge. If so it was not prejudicial. If the charge had been made as requested it could not have changed the result. The judgment and order should, therefore, be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

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JOHN I. MUNRO, Respondent, v. THE STATE OF NEW YORK,  
Appellant.

Third Department, December 28, 1917.

**Constitutional law — constitutionality of chapter 658 of the Laws of 1915 authorizing Court of Claims to hear and determine claim of State employee for which the State would not otherwise be liable.**

Chapter 658 of the Laws of 1915, authorizing the Court of Claims to hear, audit and determine the claim of an electrician employed by the State at a State hospital for the insane, for injuries alleged to have been sustained by him in the course of his employment by reason of an assault committed by an insane patient, and further providing that, if the court found the injuries were so sustained, the damages should constitute a legal and valid claim against the State, is constitutional, even though no legal liability otherwise existed.

Said act does not audit or allow the claim so as to violate section 19 of article 3 of the Constitution, or give or loan money or credit of the State "to or in aid of any association, corporation or private undertaking" in violation of section 9 of article 8 of the Constitution, nor does it appropriate public moneys for local or private purposes, within the meaning of section 20 of article 3 of the Constitution.

COCHRANE and LYON, JJ., dissented, with opinion.

APPEAL by the defendant, the State of New York, from an order and determination of the Court of Claims, entered in the office of the clerk of said court on the 9th day of December, 1916, awarding to the claimant the sum of \$21,284 for damages alleged to have been sustained by reason of an assault upon him by an inmate of the Kings Park State Hospital.

The opinion of the Court of Claims is reported in *Munro v. State of New York* (10 State Dept. Rep. 157).

*Merton E. Lewis*, Attorney-General [*Edmund H. Lewis*, Deputy Attorney-General, of counsel], for the appellant.

*Baylis & Sanborn* [*Willard N. Baylis* and *George P. Sanborn* of counsel], for the respondent.

WOODWARD, J.:

The claimant, John I. Munro, was employed by the State of New York as an electrician in and about the Kings Park State Hospital for the Insane. On the 27th day of September, 1909, he was directed to make certain repairs to the electric wires in the highway near the hospital, and while so employed he was assaulted by one of the inmates of the hospital who, under the direction of keepers, was with others engaged in sodding a portion of the highway. The claimant was struck over the head with a spade and sustained serious injuries, and we will assume for the purposes of this appeal that the State of New York was negligent in the premises in such a manner as to entail legal liability if the employer had been a private individual. There seems to be no question as to the merits of this case, and, with the modern tendency to hold individuals and corporations to liabilities unknown to the common law, it would seem to follow that the State itself should be held to a like liability in so far as the laws will permit.

Actuated by this humane impulse, no doubt, the Legislature enacted chapter 658 of the Laws of 1915, effective by its terms on the nineteenth day of May, by which it was provided that "the Court of Claims is hereby authorized to hear, audit and determine the claim of John I. Munro against the State for injuries alleged to have been sustained by him while in the employ of the State in the electrical

department of the Kings Park State Hospital at Kings Park, and in the course of such employment, by reason of being struck by a patient in such hospital; and if the court finds that such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the State, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable, notwithstanding the lapse of time since the accruing of damages, provided the claim herein is filed with the Court of Claims within one year after this act takes effect." The Court of Claims took jurisdiction of the case, under this statute, and has made an award of \$21,284, and the State of New York appeals from that award, urging that the act of the Legislature violates various provisions of the Constitution of the State.

It is probably true, as suggested by the appellant, that the State, in conducting a public hospital, would not be liable to an action of negligence for an injury resulting from the conduct of an inmate of the hospital, but the Legislature, by its enactment, has provided that this claim shall, if found to be valid, constitute "a legal and valid claim against the State, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable," so that we are not concerned with the question of legal liability; the Legislature has provided for this, if the enactment is within constitutional limits. We are thus brought to the consideration of the broad question, "Is chapter 658 of the Laws of 1915 constitutional?"

It is first urged that this statute contravenes the provisions of section 19 of article 3 of the Constitution, which provides that "the Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law." It seems to us that the act of 1915 does not audit or allow this claim; it merely provides that if the Court of Claims finds that "such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the State, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable." It is true that this does not

apparently give the Court of Claims a wide discretion in the premises, but it does permit of a judicial investigation into the cause and effect of the injuries, and the amount to be justly awarded, and if there were no other difficulties in the case we are inclined to think that the Legislature would be within its powers in providing compensation to one injured in its employ without fault on his part. But we are commanded, in the construction of the Constitution, as of other instruments, to read and construe the whole instrument, and to give effect to each part, and as chapter 658 of the Laws of 1915 impliedly promises to appropriate the money necessary to the payment of this legal claim, as allowed by the Court of Claims, we reach the question whether the claim, as audited and allowed, is one allowed according to law, and upon this proposition there appears to be no question, provided the Legislature had the power to authorize the Court of Claims to act.

We are asked to hold that chapter 658 of the Laws of 1915 violates the provisions of section 9 of article 8 of the State Constitution, but we are wholly unable to discover that the credit or money of the State is being given or loaned "to or in aid of any association, corporation or private undertaking." The money is being paid to discharge a legal claim recognized by the Legislature, and if the Legislature has the right to provide for such a payment it certainly does not involve a gift by the State. The bill is, undoubtedly, a private bill, but it is not in aid of a private undertaking under any fair construction of the language of the constitutional provision.

We are equally persuaded that the statute does not contravene any of the provisions of section 20 of article 3 of the Constitution. This act does not purport to appropriate any moneys whatever; it merely authorizes the audit of a private claim against the State of New York, and when this is done the Legislature may appropriate the money necessary for the purpose. This stage has not yet been reached, and it may not be presumed that there will be any defect in the legislation which is to follow.

The Legislature has vested in the Court of Claims the

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power to determine the just and equitable amount to be paid the claimant, and in the absence of some fact or circumstance tending to show an abuse of this discretion we are of the opinion it is not for this court to interfere.

Even if the State was not legally liable for the injury to the claimant, there was such a moral obligation, or such a basis for saying that there was a moral obligation, that the Legislature might well provide that the State should bear the loss; it had the right to make the moral obligation which it found a legal one, and assume liability. This we think may be sustained on well-established principles.

The award of the Court of Claims should be affirmed.

All concurred, except COCHRANE, J., dissenting in opinion, in which LYON, J., concurred.

COCHRANE, J. (dissenting):

My criticism of the legislation in question is that it is obnoxious to the spirit and purpose of the constitutional prohibition against an audit or allowance of a private claim by the Legislature. If this claimant or any citizen of the State while in the employ of any person or corporation within the State had sustained the same injury under the same circumstances, before he could recover it would be necessary for him to prove not only the negligence of his employer but his own freedom from contributory negligence. These essential elements have been eliminated in this case. All that the Court of Claims is required to do is to determine that the injuries of the claimant were "sustained by him while in the employ of the State in the electrical department of the Kings Park State Hospital at Kings Park, and in the course of such employment, by reason of being struck by a patient in such hospital," and to assess the damages for such injuries. The essential elements of a cause of action for negligence have been withheld from the Court of Claims and non-essentials only submitted to that court for determination. The hearing before that court is largely reduced to a formality. In reality a cause of action has been created in favor of this claimant which did not exist in favor of any other citizen at the time of the accident in question and which as to such citizen would be barred by the Statute of Limitations.

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Undoubtedly the State may pay moral and equitable obligations, but the morality and equity of this claim cannot be asserted until it has first been determined that the State was negligent and that the claimant was free from negligence, and it seems to me that the Legislature in determining those questions has to that extent audited and allowed this claim, and has left nothing to the Court of Claims except a mere shell from which the substance has been extracted.

LYON, J., concurred.

Judgment of the Court of Claims affirmed, with costs.

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In the Matter of Proving the Last Will and Testament of  
SUSIE WARNER WOLFE, Deceased, as a Will of Real and  
Personal Property.

GEORGIE B. WENTZ and Others, Appellants; FRANKLIN TRUST  
COMPANY, Respondent.

First Department, December 31, 1917.

**Surrogate's Court — practice — default of contestants on probate —  
opening default.**

Where contestants of a will offered for probate in the Surrogate's Court did not voluntarily change their counsel, but were abandoned by him on the eve of trial after the filing of objections on their behalf, their motion to open a decree of probate entered on their default should be granted.

APPEAL by Georgie B. Wentz and others from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 16th day of October, 1917, denying a motion by the contestants to open a default in a proceeding to probate a will.

*Selig Edelman* of counsel [*Toney A. Hardy* with him on the brief], *Stanchfield & Levy*, attorneys, for the appellants.

*George H. Porter* of counsel [*Delafield, Howe, Thorne & Rogers*, attorneys], for the respondent.

**PER CURIAM:**

While we are extremely reluctant to review an order of the Surrogate's Court resting upon discretion, we feel that the present case is one in which we should not hesitate to exercise our power in that regard.

The affidavits presented by the contestants appear to make it not improbable that they may be able to successfully prevent the admission of the will to probate, if afforded an opportunity, and these affidavits are met by very unconvincing denials on the part of those interested in upholding the will. The contestants did not voluntarily change their counsel on the eve of the trial. They were apparently abandoned by counsel who had undertaken to represent them, and who had filed objections in their behalf, and were left with but scant time to find other counsel and to properly instruct him. With regard to their delay in moving to open the default it is apparent that this did not prejudice the estate or any one interested in it.

In view of the repeal of former section 2653-a of the Code of Civil Procedure the result of a default on the part of contestants in a probate proceeding, is much more serious than it formerly was, and in consideration of that fact a certain liberality to opening such defaults is excusable.

It follows that the order appealed from should be reversed, and the motion to open contestants' default and restore the cause to the appropriate calendar for trial should be granted, but without costs.

Present — CLARKE, P. J., LAUGHLIN, SCOTT, DOWLING and SHEARN, JJ.

Order reversed and motion granted, without costs.

GEORGE P. MOFFAT and ANGUS P. ATWOOD, Copartners,  
Doing Business under the Firm Name and Style of MOFFAT  
& ATWOOD, Respondents, v. ARCHIBALD M. AINSLIE COM-  
PANY and ARCHIBALD M. AINSLIE, Appellants, Impleaded  
with FRANK V. AINSLIE, Defendant.

First Department, December 31, 1917.

**Pleading — complaint — allegations in disjunctive — demurrer  
sustained.**

Where the plaintiffs, suing to recover liquidated damages agreed upon in case the defendant solicited insurance business on behalf of a certain company, which business and the good will thereof the defendant had sold to the plaintiffs, allege in the disjunctive that the defendant in violation of its agreement solicited customers shown on the books of the specified company, "or" on the books of another company, "or" on the books of still another company, etc., a demurrer to the complaint should be sustained with leave to the plaintiffs to plead over.

APPEAL by the defendants, Archibald M. Ainslie Company and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of May, 1917, denying their motion for judgment on the pleadings consisting of a complaint and their separate demurrers thereto.

*Harry B. Bradbury*, for the appellants.

*James Taylor* of counsel [*S. Bishop Marks*, attorney], for the respondents.

LAUGHLIN, J.:

The plaintiffs, constituting a firm of insurance brokers, entered into a contract in writing with the appellant company, which was engaged in the same line of business, on or about the 22d of November, 1916, whereby according to the agreement as *originally drawn and signed by the appellant company* it sold, assigned and transferred to plaintiffs its name and its right, title, interest and good will in and to its business on the books of E. E. Clapp & Co., managers of the Fidelity and Casualty Company of New York, for New York and vicinity, on the 10th day of November, 1916, and in any account with or on the books or records of said Fidelity and

Casualty Company, and all commissions due or to become due on any policies or renewals or extensions of said business, and agreed that it would not at any time thereafter canvass, solicit or accept any business from any customer then on its books or records or on the books or records of the individual appellant, or who had been thereon, or on the books or records of E. E. Clapp & Co., or of said Fidelity and Casualty Company, and that it would not permit or allow or give to another the right to canvass, solicit or accept business from any of said customers, and that it would not directly or indirectly in any manner interfere with or advise any of said customers to withdraw or cancel any of their said business, or to place it or any additional business with or through any firm other than the plaintiffs, and that for a breach of any of its said agreements it would pay plaintiffs as liquidated damages the sum of \$1,500. After the agreement in that form had been signed by the appellant company, but before it was signed by the plaintiffs, a paragraph was added providing as follows: "This agreement does not include the sale of any business which is not on the books of Messrs. E. E. Clapp & Company, managers for The Fidelity and Casualty Company of New York."

The plaintiffs sue to enjoin violations of the agreement with respect to soliciting and interfering with the business, and for alleged violations thereof in that regard they seek to recover the liquidated damages. The agreement is annexed to and made a part of the complaint. The plaintiffs erroneously allege the effect of the agreement for they allege that they thereby purchased all the business of the defendant company in connection with said Fidelity and Casualty Company shown on the records, not of E. E. Clapp & Co., but of the Fidelity and Casualty Company, and allege that the agreements with respect to soliciting and interfering with business related to customers shown on the books of the appellant company, or of the individual appellant, or of E. E. Clapp & Co., or of the Fidelity and Casualty Company. It is then alleged that in violation of the agreement each of the defendants has canvassed, solicited and accepted renewals of business from customers on the books and records on November 10, 1916, of the appellants "or who had been thereon; or

on the book or books or records of E. E. Clapp & Company, or The Fidelity and Casualty Company," and they further alleged that each of the defendants has in violation of the agreement interfered with and advised customers who were or had been on the books or records of the appellants or of E. E. Clapp & Co., or of the Fidelity and Casualty Company to place their business elsewhere. These allegations being in the *disjunctive* do not show a violation with respect to the business sold which was only the business shown on the books of E. E. Clapp & Co. Under the allegations of the complaint the only alleged violations may have been with respect to business or customers shown on the books of the Fidelity and Casualty Company and not shown on any of the books of the appellants or of E. E. Clapp & Co., and if so they clearly relate to business not sold. We think that the final clause of the agreement which expressly eliminated any business shown on the books of the Fidelity and Casualty Company not shown on the books of E. E. Clapp & Co., from the sale, likewise eliminated any such business from the agreements of the appellant company with respect to soliciting and interference therewith. This is conceded, in effect, in respondents' points for they say they will be limited to injunctive relief concerning the business and customers shown on the books of E. E. Clapp & Co.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion for judgment on the pleadings, dismissing the complaint, with costs, granted, with ten dollars costs, but with leave to plaintiffs to amend on payment of the costs of the appeal and of the motion.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to plaintiffs to amend on payment of costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. ELDON  
BISBEE, Defendant.

First Department, December 21, 1917.

**Conservation Law — action to recover penalty for violation of section 191 — possession without permit of wild deer lawfully killed in State of Maine.**

The possession of wild deer or venison lawfully taken in the State of Maine and transported to this State for the personal use and consumption of the defendant, without a shipping permit issued by the State Conservation Commission, does not constitute a violation of the provision of section 191 of the Conservation Law, providing that "Wild deer or venison lawfully taken may be possessed from October first to November twentieth, both inclusive."

It is only under the second sentence of said section, providing that "A person may possess such deer or venison from November twenty-first to February first, both inclusive, provided a license so to do shall first be obtained from the Commission," that it is necessary to procure a license in order that possession shall be lawful.

LAUGHLIN, J., dissented, with opinion.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The essential facts agreed upon by the parties (the Attorney-General acting in behalf of the State) are as follows: "The defendant Eldon Bisbee, a citizen of the United States and a resident of the City, County and State of New York, shipped via American Express Company, a common carrier, from the State of Maine, consigned to the defendant at his residence in the City of New York, two wild deer, to wit: One doe and one buck, the latter having horns more than three inches in length.

"That both said deer were lawfully taken by said defendant in the State of Maine, pursuant to a license issued by said State which authorized said defendant to take, possess and ship out of said State, two wild deer whether doe or buck, during the open season.

"That said buck and doe were shipped and arrived in the State of New York in such manner and condition that they were entirely exposed to view and attached to each carcass was

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a tag taken from said license issued to defendant by the State of Maine, upon which tag was stated the name of the defendant, the number of the license, and the fact that said buck and doe were lawfully taken by defendant in, and lawfully shipped by him from the State of Maine.

"That said doe was brought into the State of New York by the American Express Company on or about the 6th day of October, 1916, and was delivered by said American Express Company on or about said date to agents of said defendant duly authorized to receive the same for and on behalf of defendant at his residence in the City of New York. That said doe was, on or about the 7th day of October, 1916, seized by duly authorized agents of the Conservation Commission of the State of New York and taken out of the possession of an agent of the defendant in the said City of New York, into whose possession it had been delivered by agents of the defendant for the personal use and consumption of the defendant and his family.

"The said buck was brought into the State of New York by said American Express Company on or about the 7th day of October, 1916. That on or about the 10th day of October, 1916, an agent of the defendant duly authorized thereto, called at the office of the American Express Company, signed a receipt for said buck and was about to receive the same when it was seized, on the premises of said American Express Company, by a duly authorized agent of the Conservation Commission.

"That at all the times herein mentioned, the said buck and doe were wholesome articles of food and were shipped into this State solely for the personal use and consumption of the defendant, and were not taken, possessed or transported for the purpose of sale, or being offered for sale, or for transportation, except as above stated.

"That neither said buck or doe had attached thereto shipping permits issued by the Conservation Commission of the State of New York.

"The plaintiff claims that the shipping into the State of New York without having attached to the shipment a shipping permit issued by the Commission as provided by Section 178, and the possession of the same, constitute a violation of the



Conservation Law;\* and that the seizure was lawful; and that by reason of such acts the plaintiff is entitled to collect from the defendant the sum of \$400.

"Defendant claims that such acts do not constitute a violation, and that if such acts are made illegal by the Conservation Law it is null and void, in that it contravenes rights secured to him by the State and Federal constitutions. Especially, that it violates the Commerce Clause and the rights secured by the Fourteenth Amendment."

*B. F. Sturgis*, for the plaintiff.

*Abraham Freedman*, for the defendant.

SCOTT, J.:

In our opinion the submitted case presents but a single question for our determination.

The gravamen of the offense charged against defendant is that "neither said doe or buck had attached thereto shipping permits issued by the Conservation Commission of the State of New York."

The only question left open, under former decisions of this court, is whether or not the "possession" of the deer by defendant, without a shipping permit, constituted an offense.

In *People v. Bisbee* (173 App. Div. 127) we had before us a precisely similar question as to partridges shot in Maine and shipped to this State, except that the question of possession by the consignee was not involved. It was held that there was no illegality "in shipping them to the State of New York until they [the birds] had arrived at their destination and a delivery made to the defendant."

In thus holding we followed *People v. Fargo* (137 App. Div. 727) which discussed at some length both the State Game Laws and the so-called Lacey Act (31 U. S. Stat. at Large, 187, chap. 553).

Up to the point, therefore, of the delivery of the deer to

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\* See Consol. Laws, chap. 65 (Laws of 1911, chap. 647), § 178, added by Laws of 1912, chap. 318, as amd. by Laws of 1913, chap. 508, and Laws of 1916, chap. 521; *Id.* § 182, added by Laws of 1912, chap. 318, as amd. by Laws of 1916, chap. 521.—[REP.]

the defendant we are constrained to hold that no illegal act is established as against him. It remains only to consider whether possession by him after delivery was unlawful. This must be determined solely by reference to the law of this State, as no Federal question is presented.

Section 191 of the Conservation Law provides in part as follows: "§ 191. Possession of wild deer or venison. Wild deer or venison lawfully taken may be possessed from October first to November twentieth, both inclusive. A person may possess such deer or venison from November twenty-first to February first, both inclusive, provided a license so to do shall first be obtained from the Commission." (Consol. Laws, chap. 65 [Laws of 1911, chap. 647], § 191, added by Laws of 1912, chap. 318, as amd. by Laws of 1916, chap. 521.)

The remainder of the section is not relevant to the question now under consideration. It will be seen that the section covers the possession of deer during two seasons, one from October first to November twentieth, and the other from November twenty-first to February first. It is only as to the second season or period that it is necessary to procure a license in order that possession shall be lawful. As to the first season or period (which covers the acts charged as unlawful against defendant) the right of possession is absolute provided only that the deer shall have been "lawfully taken," as it is conceded that the deer in question were.

When the Legislature has explicitly provided as to one season that a permit must be obtained, and has made no similar provision as to the other season we see no escape from the conclusion that it was intended to allow possession from October first to November twentieth without the necessity of procuring a permit.

It follows that upon the agreed facts no unlawful act is established on the part of the defendant, and he is entitled to judgment accordingly, with costs.

CLARKE, P. J., DOWLING and SMITH, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

I agree with Mr. Justice SCOTT that the decision made by this court in *People v. Bisbee* (173 App. Div. 127) forecloses

any further consideration here of the question as to whether a penalty may be imposed upon the defendant for *shipping* the deer into the State without a permit; but I think that *possession* here of the deer by the defendant without having obtained a shipping permit as required by subdivision 3 of section 178 of the Conservation Law (Consol. Laws, chap. 65 [Laws of 1911, chap. 647], added by Laws of 1912, chap. 318, as amd. by Laws of 1913, chap. 508) rendered such possession illegal and subjects him to the penalty demanded in the submission.

It is not expressly recited in the submission that the defendant did not accompany the deer, but the submission has been argued on the theory that he did not, and since they were transported by the express company, and at different times only a few days apart, it is to be assumed that such was the fact. It is expressly stipulated that the *doe* was *delivered* to the defendant, but it was evidently intended by the submission to leave open for argument the question of law as to whether on the facts stipulated the *buck* was *delivered* to him. The deer were consigned to the defendant at his residence in New York city and his agent called at the express office and signed a receipt for the buck and then, it is recited in the submission, as the agent "was about to remove the same" it was seized *on the premises of the express company* by an agent of the Conservation Commission. That, I think, constituted a delivery to the defendant. There could be delivery on as well as off the premises of the express company.

It is quite clear, I think, that the possession of the *doe* by the defendant without having obtained a permit for shipping her into the State was unlawful, and although I have some doubt with respect to the lawfulness of the possession of the *buck* without such permit having been obtained, I am of opinion that such was the intention of the Legislature and that the statute should be so construed.

Section 176 of the Conservation Law (added by Laws of 1912, chap. 318, as amd. by Laws of 1913, chap. 508) makes it unlawful, among other things, for any person to have in his possession at any time a wild deer except as permitted by the Conservation Law. It was competent for the Legislature to provide that there should be no open season for taking wild

game in this State and to render it unlawful for any person at any time to have in his *possession* such wild game whether taken within or without the State. (*People v. Bootman*, 180 N. Y. 1; *People ex rel. Hill v. Hesterberg*, 184 id. 126; *affd.*, *sub nom. Silz v. Hesterberg*, 211 U. S. 31.) It was, therefore, competent for the Legislature to provide an open season with such restrictions as it saw fit to prescribe. It has provided no open season for does. Therefore, were it not for other provisions of the Conservation Law which permit the importation of wild game during both the open and the closed seasons here, and without restricting the importation to game which might lawfully be taken here during the open season, the *possession* here at any time of game not permitted by our law to be taken at any time would be unlawful. It necessarily follows that in permitting the importation of game during the closed season the Legislature could make any regulation or restriction therefor which it saw fit to make or to impose. If, therefore, the defendant had imported the deer during the closed season here it is perfectly clear, I think, that it would be no defense to his possession that the Legislature in giving its consent to such possession had required that before the deer should be shipped into the State he should obtain a permit from the Conservation Commission, for the possession having been lawfully prohibited *excepting* as authorized, the defendant could not claim that his possession was lawful unless he complied with the conditions imposed by the Legislature to make it lawful. The only open season prescribed for taking wild deer in this State is for *bucks* having horns not less than three inches in length, and they are by section 190 of the Conservation Law (added by Laws of 1912, chap. 318, as *amd.* by Laws of 1913, chap. 508; Laws of 1914, chap. 92, and Laws of 1916, chap. 521) permitted to be taken in wholly inclosed deer parks in certain counties from October first to November fifteenth, inclusive.

With respect to deer lawfully taken *here* during the open season the Legislature has provided in subdivision 3 of section 178 that such deer may be transported within or from the State otherwise than by common carrier or parcel post during the open season, and that the taker may transport such deer within or from the State by a common carrier, other than

parcel post, during the open season *provided* the deer or the package containing it shall have attached thereto before shipment a shipping permit issued by the Conservation Commission with the blanks properly filled in. It will, therefore, be seen that a shipment of deer lawfully taken *within* the State *by a common carrier* is unlawful unless a shipping permit therefor has been obtained. There is no room for contention, therefore, that there is any discrimination in the statutory provisions with respect to a shipping permit against deer taken without the State, for in both instances the same shipping permit is required.

By subdivision 4 of section 178 (added by Laws of 1912, chap. 318, as amd. by Laws of 1916, chap. 521) it is provided that a taker may import into the State deer taken without the State *during the closed season here* provided the deer has been lawfully taken and may be lawfully brought from the place where taken, and provided he accompanies the same and has with him *a license* issued by the Conservation Commission permitting such transportation into the State, and such taker is permitted to ship deer lawfully taken elsewhere into the State by common carrier, other than parcel post, provided he obtains *a shipping permit* therefor as required by subdivision 3 of section 178, which is precisely the same shipping permit required of one lawfully taking deer here for shipment within or from the State. Thus the Legislature has conferred the *privilege* of bringing deer into the State during the closed season, which it might have withheld, and has imposed no limitation with respect to whether such deer could be lawfully taken here at any time.

With respect to deer lawfully taken without the State and which may be lawfully brought from the place where taken the Legislature has further provided in said subdivision 4 that the taker may bring the same into the State *during the open season here* if he accompanies the same or may ship the same into the State by common carrier, other than parcel post, *provided* he obtains a shipping permit as required by subdivision 3 of section 178.

By section 381 of the Conservation Law (added by Laws of 1912, chap. 318, as amd. by Laws of 1913, chap. 508) it is expressly declared, among other things, that where the posses-

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sion of wild game here is unlawful possession of the same species "coming from or taken without the State, shall be deemed to be and is, except as otherwise expressly provided herein, unlawful." It is evident that the word "unlawful" as first used in that section relates to deer taken here and, therefore, it is manifest that it was intended to declare the possession of deer here taken without the State to be unlawful if it would have been unlawful had the deer been taken here, unless the provisions of the Conservation Law with respect to obtaining possession of imported deer are complied with. Therefore, I think, in any event, the defendant is unable to justify his possession of the doe without complying with the condition with respect to obtaining a permit for the importation thereof since the possession of a doe taken here at any time is unlawful. Moreover it will thus be seen that the Legislature has by subdivision 4 of section 178 fully covered the subject of importing and possessing here deer taken without the State and imported during both the open and closed seasons. For this reason I am of opinion that the provisions of section 191 (added by Laws of 1912, chap. 318, as amd. by Laws of 1916, chap. 521) quoted in the opinion of Mr. Justice SCOTT should not be construed as applying to *all deer lawfully taken* whether within or without the State and that they were intended to be limited and should be limited to deer lawfully taken within the State. With respect to such deer it is therein provided that they may be possessed from October first to November twentieth, both inclusive, and that they may be possessed thereafter until and including the first of February, provided a license therefor be obtained as therein prescribed. That section contains a further provision rendering lawful the possession of deer by a common carrier the necessary time after midnight of November sixteenth to enable the carrier to deliver it provided it has been delivered to the carrier after the first of October and before that time, and also provides that possession of deer or venison from November sixteenth to February first, both inclusive, shall be presumptive evidence that the same was unlawfully taken. Those provisions indicate that the construction I have given is the true construction, for they do not, I think, apply to deer lawfully imported by common carrier into the State as authorized by subdivision 4 of section 178. With

respect to deer lawfully imported from without the State the Commission, provided the law has been observed, will have a record by the granting of the license to import it, if accompanied by the taker, and by the granting of the shipping permit if brought in by common carrier; and it would be unreasonable to hold that with respect to such deer that may be lawfully imported at any time possession from October first and after November sixteenth for the time required for delivery should be deemed lawful which by necessary implication would require a holding that possession by a carrier at any other time would be deemed unlawful. Those provisions are applicable only to deer taken here. Likewise it would be an unreasonable construction to hold that the possession at any time of deer taken without the State would be presumptive evidence that the same was unlawfully taken. That provision relates to deer taken here for the possession of which a license could be obtained for the period specified. The Legislature having provided that deer lawfully taken *within* the State cannot be lawfully shipped by common carrier without a shipping permit acted, I think, fully within its authority in prescribing that deer lawfully taken *without* the State could not be brought into the State and possessed here without a like shipping permit. No shipping permit having been obtained for either of the deer, the defendant, I think, is liable for the penalty.

I am of opinion, therefore, that the plaintiff should have judgment as prayed for in the submission.

Judgment ordered for defendant, with costs. Order to be settled on notice.

## THE CITY OF NEW YORK, Appellant, v. JAMAICA WATER SUPPLY COMPANY, Respondent.

Second Department, December 7, 1917.

**Municipal corporations — water supply, city of New York — power of commissioner to direct water company to extend its distribution system — statutes construed — order of commissioner enforced by mandamus.**

A corporation organized under section 80 of the Transportation Corporations Law for the purpose of supplying water to the authorities and inhabitants of the former town of Jamaica, now incorporated in the city of New York, is required by statute to supply said authorities and inhabitants with pure and wholesome water at reasonable rates and cost and, by virtue of section 472 of the charter of Greater New York, the commissioner of water supply, gas and electricity in his power to exercise superintendence, regulation and control in respect of the supply of water by such company may direct it to install new mains and hydrants at its own expense.

Such order of the commissioner will be enforced by mandamus where it is not capricious, arbitrary, unreasonable or tyrannical.

The powers conferred upon said commissioner by section 472 of the Greater New York charter do not relate merely to the "sources" of water supply, but have to do with distribution to the municipal corporation and to individual consumers.

APPEAL by the plaintiff, The City of New York, from an order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 1st day of September, 1917, denying its application for a peremptory writ of mandamus.

*William E. C. Mayer* [*Lamar Hardy*, Corporation Counsel, *Terence Farley* and *Edward S. Malone* with him on the brief], for the appellant.

*George H. Francoeur*, for the respondent.

STAPLETON, J.:

Notwithstanding the form of the title, the appeal is from a final order in a special proceeding denying an application made by the city of New York for a peremptory writ of mandamus.



The defendant became a corporation, pursuant to the provisions of section 80 of the Transportation Corporations Law, for the purpose of supplying water to the authorities and inhabitants of the former town of Jamaica, now incorporated in the city of New York as the fourth ward of the borough of Queens. The commissioner of water supply, gas and electricity of the city of New York made and served a written order directing the defendant to install forthwith, at its own expense, an extension of its distribution system as follows:

“In Phraner avenue, Jamaica locality, Borough of Queens, a new six-inch main from a connection with the Jamaica Water Supply Company’s existing twelve-inch main in South street, southerly to a point in Cumberland street, a distance of approximately eleven hundred and fifty (1,150) feet, with three (3) fire hydrants on the westerly side of the same, one located just north of Atlantic street, another just north of Cumberland street, and another in the middle of the block, between Cumberland and Atlantic streets, all as shown on a blue-print sketch furnished to the Jamaica Water Supply Company in connection with permit No. 211, issued from the Queens Office of the Department of Water Supply, Gas and Electricity of the City of New York, under date of August 28th, 1916.”

The defendant ignored the direction. This proceeding was then instituted.

In our opinion, the answering affidavits do not definitely raise an issue of fact beyond the authorized determination of the commissioner, and they state no facts which show that his order was capricious, arbitrary, unreasonable or tyrannical. (*People ex rel. Empire City Trotting Club v. State Racing Comm.*, 190 N. Y. 31; *Matter of Ormsby v. Bell*, 218 id. 212.)

The duties of the defendant and the powers of the commissioner are defined by statute: “Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, or wherein such corporations may have organized, with pure and wholesome water at reasonable rates and cost, and the board of trustees of any incorporated

village and the water commissioners or other board or officials performing the duties of water commissioners, and having charge of the water supplies of any city of this State, shall have the power to contract in the name and behalf of the municipal corporation of which they are officers, for the term of one year or more for the delivery by such company to the village or city, of water through hydrants or otherwise, for the extinguishment of fires and for sanitary and other public purposes; and the amount of such contract agreed to be paid shall be annually raised as a part of the expenses of such village or city, and shall be levied, assessed and collected in the same manner as other expenses of the village or city are raised, and when collected shall be kept separate from other funds of the village or city, and be paid over to such corporation by such trustees or city officials, according to the terms and conditions of any such contract; and any such contract entered into by the board of trustees of any village, or by water commissioners or other board performing the duties of water commissioners and having charge of the water supply of any city, shall be valid and binding upon such village or city, but no such contract shall be made for a longer period than ten years nor for a sum exceeding in the aggregate, two and one-half mills for every dollar of the taxable property of such village or city, per annum, except upon a petition of a majority of the taxable inhabitants of any such village or city, or portion thereof, which it is proposed to supply with pure and wholesome water, unless a resolution authorizing the same has been submitted to a vote of the electors of the village or city, in the manner provided by the village law or city charter, and approved by a majority of the voters entitled to vote and voting on such question at any annual election or special election duly called; and any board of trustees or board of water commissioners or other city officials, when so authorized, may make such contract for a term not exceeding thirty years, and the amount of such contract shall be paid in semi-annual instalments." (Trans. Corp. Law [Consol. Laws, chap. 63; Laws of 1909, chap. 219], § 81; *People ex rel. Urban W. S. Co. v. Connolly*, 164 App. Div. 163; *affd.*, 213 N. Y. 706.)

"The commissioner of water supply, gas and electricity is

hereby authorized to examine into the sources of water supply of any private companies supplying The City of New York or any portion thereof or its inhabitants with water, to see that the same is wholesome and the supply is adequate, and to establish such rules and regulations in respect thereof as are reasonable and necessary for the convenience of the public and the citizens; and the said commissioner may exercise superintendence, regulation and control in respect of the supply of water by such water companies, including rates, fares and charges to be made therefor, except that such rates, fares and charges shall not, without the consent of the grantee, be reduced by the said commissioner beyond what is just and reasonable; and in case of a controversy, the question of what is just and reasonable shall be finally determined as a judicial question on its merits by a court of competent jurisdiction." (Greater N. Y. Charter [Laws of 1897, chap. 378], § 472, as amd. by Laws of 1901, chap. 466.)

The positive duty to supply the authorities or any of the inhabitants of the designated locality with pure and wholesome water at reasonable rates and cost is imposed by plain words, commonly used. The power of the commissioner to "exercise superintendence, regulation and control in respect of the supply of water by such water companies, including rates, fares and charges to be made therefor," is conferred by words no less plain.

The argument successfully addressed to the learned Special Term by the respondent is repeated here, viz., that the powers conferred by section 472 of the Greater New York charter relate only to the sources of supply. To sustain the argument, words of plain import and definite meaning, written into the statute, must be disregarded as inexpressive. The context strengthens the conviction that the limitation is unwarranted. What relation can "rates, fares and charges" have to sources of supply? Certain powers, expressly prescribed, have to do with sources of supply, and certain powers, expressly prescribed, have to do with distribution to the municipal corporation and to individual consumers. We think the order was valid and that obedience to it should be enforced.

The order should be reversed, with ten dollars costs and

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disbursements, and the motion for a peremptory writ of mandamus granted, with fifty dollars costs.

THOMAS, MILLS, RICH and BLACKMAR, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion for peremptory writ of mandamus granted, with fifty dollars costs.

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CAROLINE HANKE, as Administratrix, etc., of ANTONIO HANKE, Deceased, Appellant, v. THE NEW YORK CONSOLIDATED RAILROAD COMPANY, Respondent.

Second Department, December 21, 1917.

**Workmen's Compensation Law — death caused by person not employer — election of remedies — Workmen's Compensation Law, section 29, construed — widow may elect for minor child — subrogation to action against wrongdoer — administration not essential.**

Under section 29 of the Workmen's Compensation Law relating to an election of remedies where an employee is killed by the wrongful act of another not in the same employ, and allowing the dependents to elect whether to take compensation from the employer under the statute, or to pursue the remedy against the wrongdoer, and providing for an assignment of the claim against the wrongdoer if the dependents elect to take under the statute, the widow of the decedent may elect, not only for herself but for her minor child, to take under the statute.

When she has so elected and has received the award made to herself and child, the employer or the State, as the case may be, is subrogated to the right of action against the wrongdoer, and such action cannot thereafter be brought on behalf of said dependents.

The above rule was in force by implication even before section 29 was amended by chapter 622 of the Laws of 1916, so as to give in express terms to a parent or guardian the right to elect for a minor.

A widow need not have been appointed administratrix of her husband's estate in order to make such election for herself and child.

APPEAL by the plaintiff, Caroline Hanke, as administratrix, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 21st day of December, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order

entered in said clerk's office on the 24th day of November, 1916, denying plaintiff's motion for a new trial made upon the minutes.

*Ralph G. Barclay* [*Robert Stewart* with him on the brief], for the appellant.

*Harold L. Warner* [*D. A. Marsh* and *George D. Yeomans* with him on the brief], for the respondent.

STAPLETON, J.:

The death of plaintiff's intestate occurred while he was in a hazardous employment. His employer was the Transit Development Company, a domestic corporation. A verdict was directed against plaintiff in this action, and from the judgment entered upon it this appeal is taken.

We will assume that the evidence made it a question of fact for the jury to determine whether the neglect of the defendant was a proximate cause of the injuries from which death ensued, and that unless a separate defense pleaded in the answer barred the plaintiff's recovery, a verdict should not have been directed.

The facts alleged as constituting that defense are that the deceased was employed by the Transit Development Company in a hazardous employment within the meaning of the Workmen's Compensation Law (Laws of 1914, chap. 41, as amd. by Laws of 1914, chap. 316, constituting Consol. Laws, chap. 67); that his death resulted from an accidental personal injury arising out of and in the course of his employment, and that the Transit Development Company, on or about July 1, 1914, secured, and has ever since kept secure, the payment of compensation for the disability or death of its employees as required by the Workmen's Compensation Law under and in pursuance of subdivision 3 of section 50 of that law. All of this was admitted on the trial. The answer further alleged that Caroline Hanke, widow of the deceased, on behalf of herself and her child, Casimier Hanke, who was twelve days of age at the time of the father's death, filed on February 25, 1915, in accordance with the provisions of the Workmen's Compensation Law, a claim for compensation and elected to take compensation from the Transit Develop-

ment Company; that on March 16, 1915, the Workmen's Compensation Commission made an award to said Caroline Hanke and Casimier Hanke and that all payments under such award, accruing to a given date, had been paid to and accepted by the said Caroline Hanke and Casimier Hanke. It also alleged that on April 20, 1915, the Transit Development Company commenced an action against the defendant to recover upon the cause of action arising out of the injury and death of said Antonio Hanke, the deceased, claiming to be subrogated to the rights and remedies of said Caroline Hanke and Casimier Hanke. Evidence, not disputed, was offered on the trial in proof of the facts alleged. Among the documents received in evidence was a record of the proceeding in the matter of the claim of Caroline Hanke to recover for the death of her husband, including the findings of the Workmen's Compensation Commission and the award made by the Commission to both Caroline Hanke and Casimier Hanke. That record shows that the Commission awarded to Caroline and her child bi-weekly payments of ten dollars and eighty-four cents, of which eight dollars and fourteen cents was for herself and two dollars and seventy cents for the child. She received and accepted payments under that award. She made application to the Commission to withdraw her claim for compensation, and her application was denied on the ground that an award had been made and that she had accepted payments on account thereof.

Section 29 of the Workmen's Compensation Law, as it was at the time of the death of the intestate, read:

"§ 29. Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the State insurance fund, if compensation be payable therefrom,

and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the Commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the Commission, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 29.)

A point in the brief of the appellant presents this statute for interpretation. The point is stated:

"The claim for compensation should not be construed as an election, or as an assignment, and in any event, not an election or assignment upon the part of the infant, Casimier."

In developing her point the appellant argues that the election and assignment are invalid for the reason that on the date she signed the instrument in which she made the claim for compensation under section 16 of the Workmen's Compensation Law and assigned the cause of action against the defendant, she was not in a position to make any election between the claim and the remedy by suit against the defendant tortfeasor because, not then being administratrix, she had no control over the action for death given by the Code of Civil Procedure, and had no power or authority to waive it or assign it; and, furthermore, if she could elect to waive her own benefits accruing from a suit to recover for damages for the pecuniary injury she suffered through the death of her husband, and assign her claim, she could not, in her private capacity, waive or assign the claim of the other beneficiary, the decedent's child.

In support of her contention she offers the decision in

*Stuber v. McEntee* (142 N. Y. 200). That action was one by administrators to recover damages in an action brought under sections 1902 to 1905 of the Code of Civil Procedure. The defendant paid a sum of money to one of the plaintiffs, not a statutory beneficiary, before his appointment as administrator of the goods, chattels and credits which were of the decedent whose death was caused by the defendant's neglect. The plaintiff, who received the money, gave therefor a receipt which stated that the payment was for all expenses caused by the death and that he had no further claim against the defendant. The court held that the receipt was not a settlement of the claim or a bar to the action.

The appellant directs attention to the fact that after the action at bar was commenced, and by chapter 622 of the Laws of 1916, the Workmen's Compensation Law was amended by adding to section 29 thereof the following provision: "Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the Commission may determine by rule in each case."

It is now desirable to expose section 16 of the Workmen's Compensation Law (as amd. by Laws of 1914, chap. 316):

"§ 16. Death benefits. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

"1. Reasonable funeral expenses, not exceeding one hundred dollars;

"2. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or



children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until the age of eighteen years; \* \* \* provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages.

" 3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

" 4. If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

" Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident."

This court, in the Third Department, in *Matter of Woodcock v. Walker* (170 App. Div. 4), decided that under section 16 of the Workmen's Compensation Law the surviving wife and principal dependent is entitled not only to thirty per centum of the average wages of the deceased during her widowhood, but also to the additional amount of ten per centum of such wages for each minor child until the age of eighteen years.

We see no reason why a widow with a dependent child should not, for herself and her child, make an election under section 29 of the act; and we consider that the provision added to that section by chapter 622 of the Laws of 1916, which we have hereinbefore quoted, has no greater effect than to make plain a provision which before the amendment was not clear, and that it was not designed to give a power which theretofore did not exist.

The *McEntee* case presents no obstacle to the passing of a law whereby the widow, for herself and her infant children, next of kin of the deceased, for whose benefit the cause of action was given by the Code of Civil Procedure, might in certain cases and for certain purposes assign the cause of action. That is exactly what the Legislature has done in the Workmen's Compensation Law. The Legislature had the task of providing certain and speedy compensation for the dependents of those killed in hazardous employments which it designated and grouped. In formulating the policy many rules of common-law liability had to be abolished and an insurance feature had to be established. The liability of joint tort feorsors had to be considered. A constitutional provision against abrogating the right of action to recover damages for injuries resulting in death had to be observed. The conservation of the home of the workman with a wife and minor children was a dominant circumstance. The incapacity of minors to contract and to waive without special legislative authority, even if mentally capable of contracting and waiving, had to be borne in mind. Tedious and expensive litigation was to be avoided and unnecessary forms were to be dispensed with. To the success of the plan an exclusive remedy was necessary. The Legislature did not attempt to abrogate the right of action to recover damages for injuries resulting in death when those injuries were caused by the negligence or wrong of another not employed by the same employer. It required the dependents, if they would have the full benefit under the act, to make an election. They are to elect whether to take from the decedent's employer or to pursue their remedy against the person other than the decedent's employer whose negligence or wrong caused the death of the deceased. If they elect to take compensation

from the employer, the cause of action against the other shall be assigned to the State for the benefit of the State insurance fund if compensation be payable therefrom, or otherwise to the person or association or corporation liable for the payment of such compensation; and if they elect to proceed against such other, the State insurance fund, person, association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount recovered against such other person and actually collected and the compensation provided or estimated by the Workmen's Compensation Law.

We must presume that the Legislature, when it passed this law, knew that the only right of action was that given by the Code of Civil Procedure (§§ 1902-1905) and preserved by the Constitution (Art. 1, § 18), and that it had no power to affect that right of action except in so far as it was authorized so to do by section 19 of article 1 of the Constitution. In a case where the negligence or wrong of another wholly or partially caused the injury resulting in death, the Legislature did not wish to exclude from the benefits of the Workmen's Compensation Law the dependents of an employee whose death resulted from an accidental personal injury sustained by him in the course of his employment and arising out of it, without regard to his fault as to the cause of such injury excepting the personal faults specifically condemned by the statute. Neither did it wish to disregard the salutary common-law rule that there shall not be a double satisfaction for the same injury. In conferring upon such dependents the benefits of the statute, the Legislature may not have been precise and may not always have regarded with nicety words used in the Code of Civil Procedure in establishing the right of action; but it is quite plain that it regarded the substance rather than the form; that it had in mind the beneficiaries rather than the legal representatives as that term is ordinarily understood. It did not remit the dependents of an employee, unless they or the parent or other person authorized to speak for them, wished, to the hazards of a litigation which might be protracted and fruitless. It was enacting a workable statute to promote an important reform in jurisprudence. To make the procedure simple and

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inexpensive, the creator of statutory guardians dispensed with them. In the same effort to effect inexpensiveness and simplicity, it eliminated legal representatives and created another statutory agent to act in behalf of infant beneficiaries.

We have examined the other points of the appellant in which error is assigned, but we do not think it is necessary to discuss them.

The judgment and order should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, STAPLETON, RICH and BLACKMAR, JJ.

Judgment and order unanimously affirmed, with costs.

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MARY S. BOYCE, Respondent, v. GREELEY SQUARE HOTEL COMPANY, Appellant.

Second Department, December 29, 1917.

**Innkeeper — right to enforce rules to prevent immorality or other misconduct by guests — action based on improper entrance by servant into guest's room — damages — physical suffering included in compensatory damages — evidence — letter by managers of defendant to plaintiff's husband — verdict not excessive.**

An innkeeper has the right to make and enforce proper rules to prevent immorality or any other form of misconduct tending to injure the reputation of his house, and has the right of access to the room of a guest under reasonable and proper circumstances and at proper times.

But such rule has no application and does not furnish a defense to a cause of action by a guest for damages resulting from the entrance to her room of a hotel detective, where the defendant had notice that the plaintiff and the man who accompanied her to the hotel and to the room assigned her were husband and wife, and also that she was an invalid requiring treatment at times, which had to be given her by her husband, and that a room was given her for the express purpose of permitting her husband to visit her therein, and that he was informed that he might do so.

In such an action physical consequences, including pain which was the direct result and consequence of the breach of duty owing a guest by an innkeeper, are included in and may be recovered as compensatory damages.

A letter written by the managers of the defendant to the plaintiff's husband expressing regret at the offense, was within the scope of their authority and the letter was competent evidence.

Evidence examined, and *held*, that a verdict of \$8,000 is not excessive  
JENKS, P. J., and BLACKMAR, J., dissented.

APPEAL by the defendant, Greeley Square Hotel Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 28th day of June, 1917, upon the verdict of a jury for \$8,000, and also from an order entered in said clerk's office on the 22d day of June, 1917, denying defendant's motion for a new trial made upon the minutes.

*Kenneth C. Kirtland*, for the appellant.

*Benjamin Patterson* [*Henry A. Uterhart* with him on the brief], for the respondent.

RICH, J.:

The circumstances upon which the plaintiff bases her right to recover took place at the Hotel McAlpin, operated by the defendant, in the city of New York, on September 22, 1915. It appears that the plaintiff, accompanied by her husband and daughter, went to the Hotel McAlpin on September 21, 1915, at about seven o'clock in the afternoon. Plaintiff's husband informed defendant's room clerk that he wanted a room for his wife and daughter, whom he registered as "Mrs. Alexander R. Boyce and Miss Florence Boyce." The clerk replied that he would give them a room on the sixth floor, but on being informed by Mr. Boyce that his wife, the plaintiff, was an invalid and needed attention at times which he had to give her, assigned room No. 1508 on the fifteenth floor to them because, as he stated, no men were allowed on the sixth floor. He told them that the husband could visit her and give her the treatment required on the fifteenth floor. The plaintiff was conducted to the room assigned her, accompanied by the husband and daughter, where they remained together about an hour and then went to the hotel restaurant, on a lower floor, where dinner was served to them, after which plaintiff's husband went to their home on Long Island, she and her daughter remaining at

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the hotel and occupying the room assigned them. The next day, between three and four o'clock in the afternoon, plaintiff and her daughter left the hotel to do some shopping, leaving the key to their room with the floor clerk at the elevator, plaintiff telling her that she expected her husband, and, when he came, to give him the key and tell him to go to the room and she would be back soon. About five o'clock plaintiff's husband reached the hotel. Upon the fifteenth floor he inquired of the floor clerk if Mrs. Boyce was in her room and was informed that Mrs. Boyce was out but had left the key for him. He went to the room and, about half an hour later, was joined by his wife and daughter. Later, they went to the dining room for dinner, after which plaintiff and her husband returned to the room, the daughter remaining on the mezzanine floor. The door to the room was locked, the ventilator closed, and the plaintiff prepared for a treatment by removing her clothing, putting on her night robe and lying on the bed; a douche pan was placed under her hips; her husband proceeded with the treatment, which he had about half finished when there was a knock upon the door and a demand that it be opened or it would be broken in. Plaintiff's husband thereupon, after inquiring who was there and receiving no answer, went to the door, which he unlocked and opened. The defendant's head house officer, Denniston, and his assistant Brazier, were standing in the hall. Mr. Boyce inquired, "Who are you" — "What do you want?" Denniston replied: "I am the hotel detective. You are prostituting this hotel. You are using this place for a whore house." Plaintiff's husband said, "This lady is my wife; I am giving her douches." Denniston replied, "So much the worse, you are under arrest; come along with us." Mr. Boyce replied: "You wait until I get through what I'm doing. I will show you in a moment who I am. I have got commutation and I have got letters." Denniston had entered the room and remained in it while this conversation was taking place, an interval of two or three minutes, and also until after Mr. Boyce removed the douche pan from under his wife's body, and emptied its contents; after doing this, Mr. Boyce put on his coat and accompanied the house officers to the office. Plaintiff testified that in

addition to the conversation quoted, Denniston called her a prostitute. On returning to the room, plaintiff's husband found his wife in hysterics, complaining of pain in her head, and very weak, in which condition she remained during the night. She was removed to another room on the twenty-fifth floor, and the following day received treatment from her family physician, who testified that he found her in a very nervous, excitable and hysterical condition, suffering pain, which, as he testified, she has suffered "ever since." The defendant contends that it had a rule prohibiting a man from visiting a woman in her room without permission being first obtained from the manager's office, and the house officers testified that in what they did they were acting under this rule, after first ascertaining that there was no slip either on the floor or at the room clerk's desk giving permission to any man to visit either of the ladies in room No. 1508, to whom the register showed it was assigned. The rule referred to was not posted in the hotel, and guests were not informed of its existence. While an innkeeper has the right to make and enforce proper rules to prevent immorality, or any other form of misconduct tending to injure the reputation of his house, or which violates the recognized moralities and proprieties of life, and has the right of access to the room of a guest under reasonable and proper circumstances and at proper times, such rule has no application to the facts presented by the record in the case at bar, and does not furnish a defense to the plaintiff's cause of action, for the reason that the defendant had notice that the plaintiff and the man who accompanied her to the hotel and to the room assigned her were husband and wife, and the further fact that she was an invalid requiring treatment at times, which had to be given her by her husband; a room was given her on the fifteenth floor for the express purpose of permitting her husband to visit her therein, and he was informed that he might do so. If any permission was required, it was given. Furthermore, there was concededly a telephone in plaintiff's room, and the house detectives admitted that they knew that fact and that they could have ascertained the relation of the parties occupying the room and for what purpose the plaintiff's husband was in her room, without going to

the room at all. They testified that their purpose in going there was to learn from the man and woman who the man was and for what purpose he was there.

Upon the trial the plaintiff was permitted to prove, over defendant's objection and exception, the physical pain and suffering she endured, at the time of the occurrence and thereafter, as the direct result of the invasion of her room. The trial court was requested to instruct the jury that if they found "that the defendant is at all liable to the plaintiff in this case, then the measure of defendant's liability, if any, will be purely compensatory and not punitive, that plaintiff's right to recover is confined to such injury to her feelings and to such personal humiliation as she may have suffered and to nothing else." The complaint alleged that because of the acts of the defendant she "suffered pain, shame and anguish." The court stated that he would not charge "quite in that form," and called the attention of counsel to the fact that there was evidence in the case of physical pain which his request did not embrace, and that if he would include "physical pain" in such request he would charge as requested. Counsel then requested the further charge that "any other injury except injury to her feelings and such personal humiliation as she may have suffered should be enforced in another action," which request was refused, and an exception taken. The appellant now contends that the exceptions referred to present reversible error, the argument being that the rule of damages applicable to actions of this character, and the defendant's full liability therein is that the right of recovery is limited and confined by the decision of the Court of Appeals in *De Wolf v. Ford* (193 N. Y. 397) "to such injury to her feelings and such personal humiliation as she may have suffered. \* \* \* That is the extent to which the defendants' liability may fairly be said to spring from their breach of duty. Any remedy beyond that which the plaintiff may seek to assert must be invoked in a different form of action." The case cited is not an authority for the proposition that physical consequences, including pain, which are the direct result and consequence of the breach of duty owing a guest by an innkeeper, of the character presented by the record in the



case at bar, are not included in, and may not be recovered as, compensatory damages in an action for the breach of an innkeeper's duty to a guest. In the case cited the complaint alleged the use by the defendant's servant of vile and insulting language imputing immoral conduct to the plaintiff, accompanying an order to leave the hotel. Upon the trial the complaint was dismissed upon the ground that no cause of action was therein alleged. Upon appeal, the Appellate Division of the First Department affirmed the judgment, holding that the complaint alleged no cause of action other than slander, and the alleged defamatory words not being set forth in full, it could not be sustained (119 App. Div. 808). Upon appeal the Court of Appeals reversed the judgments both of the Appellate Division and Trial Term, and granted a new trial upon the ground that the complaint averred a cause of action for breach of the contract of the defendant innkeeper, in that the plaintiff was entitled to decent and respectful treatment at the hands of the defendant and his servants. The question of whether the plaintiff in such an action could recover for physical pain and suffering as a direct result and consequence of the breach of defendant's duty towards her, when pleaded, was not presented to the court, and the language quoted was not intended as an assertion that such pain and suffering could not, when pleaded, be considered as elements of the damages recoverable in an action by a guest to recover from an innkeeper for breach of his duty, but simply to distinguish an action founded on such breach of duty from one where slander or assault was the gravamen of the action. The only case cited by that court in support of its declaration of the general rule of damages (*Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347) recognizes in its citation of authorities the rule that physical suffering when the direct result and consequence of breach, as in the case at bar, is an element of compensatory damages in an action of this character. If damages for pain, sickness, physical or mental impairment cannot be recovered in this action, they cannot be recovered at all, for such damages do not create a separate or independent liability, for which an action would lie. The damages resulting from the transaction herein cannot be divided, and a judgment in this action would bar a further recovery for

additional damages resulting from the same transaction. No authority to which our attention is directed sustains the appellant's contention that the damages which are recoverable in this action are not such as would fully compensate the plaintiff for the pain, suffering, humiliation and impaired health which she suffered and which were the direct result and consequence of the defendant's breach of duty. Plaintiff's recovery in the case at bar was expressly limited by the trial court to compensatory damages. Every other element of damages, including punitive damages and the alleged slander, were excluded, and the verdict represents actual damages, the direct result and consequence of defendant's breach of duty, and is compensatory only.

The plaintiff was permitted, over defendant's objection and exception, to put in evidence the following letter from defendant's managers to plaintiff's husband, written on September thirtieth, a week after the occurrence upon which this action is founded, viz.:

*" September 30th, 1915.*

" MR. ALEXANDER R. BOYCE,

" Long Island City, L. I.:

" DEAR MR. BOYCE.— We would like to have our Mr. Denniston who so unfortunately gave you offense in the manner he handled the unusual incident of your recent stay at the McAlpin, call to apologize.

" We hope that you will be so lenient as to permit this and we sincerely trust you will be willing to accept the apology. We feel that Mr. Denniston was over-zealous and very mistaken in his attitude toward you. The only extenuation is in our rigid policy of protecting the good name and repute of this hotel in the way explained to you by the writer. If you will kindly take this into consideration and accept Mr. Denniston's apology, we hope you will then feel everything possible in the way of reparation has been done.

" With deep regret that you should have suffered so unfortunate an annoyance, we are,

" Very truly yours,

" MERRY & BOOMER,

" Managers,

" L. M. BOOMER."

The objection was based upon the ground that the letter was "incompetent, irrelevant and immaterial," being written after the hotel occurrence and not binding upon the defendant. It is contended that the exception taken to its admission presents reversible error, the letter not being written by the defendant or to the plaintiff, but by a person not a party to the action, to plaintiff's husband, also a stranger to the action, and not a part of the *res gestæ* of the matter in suit; that the admission of an agent to bind his principal must be made not only during the continuance of the agency, but at the very time of the transaction in question, so as to form part of the *res gestæ*. The defendant conducts its business as a hotel-keeper by the managers by whom the letter was written. The manager, who wrote for himself and associate, was informed of the transaction by Denniston immediately after its occurrence, and had made an explanation to plaintiff's husband, as appears from the letter. The letter contains no statement or admission of any act claimed by the plaintiff to have been committed by defendant's servants, nor does it admit or deny the same. It is simply an expression of regret that offense should have been given by the manner in which Denniston "handled the unusual incident of your recent stay at the McAlpin;" that the defendant's managers would like to have him call and apologize, and that such apology be accepted as "everything possible in the way of reparation." No "unusual incident" is shown by the evidence to have occurred except that in which both the plaintiff and her husband, the recipient of the letter, were participants. Although directed to plaintiff's husband, the letter was plainly intended to offer an apology, by way of reparation, to both the plaintiff and her husband for the occurrence which gave the offense, without admitting anything connected with the transaction except that it gave offense to the interested parties. It refers to "your recent stay at the McAlpin" as the time of the transaction for which the apology was tendered. It was the plaintiff who stayed at the hotel, not her husband. It is immaterial to whom the letter was addressed, it being apparent that it referred to the occurrence upon which this action is based. In writing the letter the managers of the defendant were engaged in the business of their principal and in the

performance of their duty to it and in its interests; their act was within the scope of the authority, and the letter was competent. (*Stiecher Lithographic Co. v. Inman*, 175 N. Y. 124.) Furthermore, if I am wrong in this conclusion, the admission of the letter did not harm the defendant or constitute such a prejudicial error as to demand reversal.

It is contended that the verdict is excessive. Twelve men of affairs have assessed plaintiff's damages at \$8,000, and the learned and experienced justice who presided at the trial has found that it is not excessive. In these circumstances, any lingering doubt as to whether the verdict was excessive should be resolved in favor of defendant's innocent victim.

It follows that the judgment and order must be affirmed, with costs.

THOMAS and STAPLETON, JJ., concurred; JENKS, P. J., and BLACKMAR, J., voted to reverse, unless plaintiff stipulate to reduce the verdict to \$2,500, in which case they vote to affirm.

Judgment and order affirmed, with costs.

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CHARLES L. MEYER, Respondent, v. HUDSON TRUST COMPANY, Appellant.

First Department, December 31, 1917.

**Bills and notes — action to recover damages because of refusal of bank to honor check — evidence showing right to nominal damages only — proof necessary to sustain verdict for substantial damages — new trial.**

Action to recover damages for a refusal of the defendant bank to honor a check drawn upon it by the plaintiff who was a depositor. Evidence examined, and *held*, that the plaintiff is entitled to recover at least nominal damages.

But the plaintiff cannot base a right to substantial damages upon mere proof that the check was drawn in favor of a person who manufactured an invention of the plaintiff's and the dishonor of the check incensed the payee to a degree where he refused to proceed with the manufacture unless he were paid in advance, etc., where it does not appear that the

defendant had knowledge of the plaintiff's contract with the payee, or could have foreseen that its refusal to pay the check would lead to an abrogation of the contract, as such result was not within the contemplation of the parties.

Although the judgment rendered on a verdict for substantial damages is reversed, a new trial will be granted, with costs to abide the event, as the plaintiff may be able to show facts on a new trial entitling him to substantial damages.

APPEAL by the defendant, Hudson Trust Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of April, 1917, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 2d day of April, 1917, denying defendant's motion for a new trial made upon the minutes.

*Victor E. Whitlock* of counsel [*Holm, Whitlock & Scarff*, attorneys], for the appellant.

*James R. Speers* of counsel [*Jeremiah A. O'Leary*, attorney], for the respondent.

SCOTT, J.:

The plaintiff has recovered a substantial sum as damages for defendant's refusal to honor a check drawn upon it by him. At the trial there was a sharp conflict as to whether or not the plaintiff had a sufficient amount on deposit to meet the check when it was presented. That question was decided by the jury in plaintiff's favor, and the defendant, accepting for the purposes of this appeal the finding of the jury on that subject, complains now only of the amount of the recovery, insisting that the plaintiff is entitled at the most to only nominal damages. There is no evidence in the case that the defendant's refusal to honor the check was induced by malice or any other wrongful intent, and the court expressly so charged without objection or exception on the part of plaintiff. The action must, therefore, be considered as one for damages for the breach of defendant's contract with plaintiff.

The measure of damages in such a case is not doubtful and is not different from the general rule applicable to all cases of a breach of contract unaccompanied by malice or

wrongful intent. In *Brooke v. Tradesmen's Nat. Bank* (69 Hun, 204) the court said: "It is undoubtedly the rule that the refusal to pay a check upon presentation gives the drawer a right of action in case he has funds in the bank to meet the check, and the refusal to pay was without authority, and that the measure of damages will be the amount of actual loss the party has sustained, and that damages which may fairly and reasonably be considered as naturally arising from the breach of contract according to the usual course of things are always recoverable." In *Landsberger v. Magnetic Telegraph Co.* (32 Barb. 530, quoting from *Griffin v. Colver*, 16 N. Y. 489) the court said: "'The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation. And they must be certain both in their nature and in respect to the cause from which they proceed.' \* \* \*

The defendants were not informed of any special use intended to be made of this sum of money; and what damage might they naturally expect to follow from the delay in the receipt of it? Clearly, the loss of the use of that sum during the time that its receipt was delayed, and the damages for the loss of such use are, by the laws of New York, determined to be the interest on the money for the period of the delay, at seven per cent per annum."

Very many cases might be cited to the same effect. The general rule upon the subject was well summarized in *Central Trust Co. v. Clark* (92 Fed. Rep. 293, 297), as follows: "From the considerations which move the reason, and from the American and English authorities upon this subject, the following general rules may be deduced, which are equally applicable to the measurement of damages based upon the loss of profits and to the measurement of damages founded upon other losses:

"(1) Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the

particular circumstances of the case which are known to them when the contract is made, and those only, may be recovered in action upon a contract. \* \* \*

"(2) In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered. \* \* \*

"(3) Proof of knowledge by the defaulting party, at the time he makes the contract, of special circumstances which make damages other than those implied by the contract, and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof.

"(4) Damages which are the natural and probable result of a breach of a contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered."

In the present case the plaintiff showed that he had for some months kept a small checking account with defendant; that on March 13, 1914, he had drawn a check on defendant to the order of one S. Harry Groth; that the check when presented was dishonored on the ground that it was drawn against uncollected items, for which reason the defendant was without sufficient funds belonging to plaintiff to pay the check. As has been said, that ground of refusal is now conceded to have been erroneous. The plaintiff, therefore, on the case as presented, was entitled to at least nominal damages.

The question we have to consider is whether or not he is entitled to substantial damages. He testified that he was the inventor and patentee of an article called a "rotary chopper," which is not definitely described, but which was placed on sale with department stores at about fifty cents apiece. He employed a traveling salesman and demonstrator. Having no facilities for manufacturing himself, he

made a verbal contract with a man named Groth in Philadelphia to manufacture the choppers at the cost of ten cents for each chopper, plaintiff furnishing the steel and dies and patterns. The check which defendant refused to honor was drawn in favor of Groth and was given in payment for 1,000 choppers which Groth had manufactured. Groth was so incensed at the dishonor of the check that he refused to proceed with the manufacture of the choppers unless he was paid in advance for each lot of 1,000 which he was to turn out. Plaintiff, being either unable or unwilling to make payment in advance, sought another manufacturer, and before he was able to find one with whom he could make satisfactory arrangements the war broke out and seriously interfered with the market for choppers. In the meantime Groth had refused to give up the dies and patterns which had been left with him and were plaintiff's property, and the latter was obliged to retain a lawyer and take legal proceedings in order to regain them at a cost of some \$400. He estimates that if the check had been paid Groth would not have refused to go on with the contract and would have continued to manufacture the choppers in large numbers, and that very many of them would have been sold whereby plaintiff would have realized large profits. No direct and immediate damage is shown as having resulted from the dishonor of the check and no damage at all except as above recited.

It seems to be quite plain that defendant cannot be held liable for substantial damages upon this state of facts. It knew nothing whatever about plaintiff's contract with Groth, and could not possibly have foreseen that its refusal to pay the check would have led Groth to abandon the contract of which it had no knowledge, or that Groth would refuse to give up the dies and patterns, or that the war would break out and spoil the market for the choppers. The damages sought to be recovered were remote, contingent and to a large extent speculative. As was said by the Court of Appeals in *Rochester Lantern Co. v. Stiles & Parker Press Co.* (135 N. Y. 209, 217): "The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect of the cause from which they proceeded. Under this latter rule speculative, contingent



and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation."

The circumstance that defendant had no knowledge of plaintiff's contract with Groth and, therefore, could not have foreseen that the refusal to pay the check would lead to an abrogation of that contract is of great importance, for any loss arising from that source cannot fairly be supposed to have entered into the contemplation of the parties when they made the contract for the breach of which this action is brought. To authorize a recovery for such damages it was necessary to bring home to defendant knowledge of the contract with Groth and the dependence of plaintiff's contract with Groth upon defendant's fulfillment of its contract with plaintiff. (*Brauer v. Oceanic Steam Nav. Co.*, 66 App. Div. 605, 607.) Upon the case as made, therefore, the plaintiff failed to show that he was entitled to more than nominal damages, and we do not ordinarily grant a new trial merely to permit of the recovery of such damages. In the present case, however, the plaintiff may be able to show on a new trial facts entitling him to substantial damages; and the judgment and order appealed from will, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event, the finding of the jury that the plaintiff is entitled to substantial damages, on the record before us, being reversed.

CLARKE, P. J., LAUGHLIN, DOWLING and SHEARN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

GEORGE McM. GODLEY, as Executor, etc., of ELIZABETH McM. GODLEY, Respondent, v. CRANDALL & GODLEY COMPANY and Others, Appellants.

First Department, December 31, 1917.

**Corporation — representative action by stockholder — pleading — failure to allege or prove demand that directors bring action — failure to establish illegality of payments made by directors — employment of counsel to contest receivership — executors of deceased director not liable for subsequent acts of directors — director who did not participate in wrongful expenditures not liable.**

A stockholder cannot maintain a representative action in behalf of his corporation against directors to recover moneys of the corporation alleged to have been illegally disbursed in the absence of allegation and proof that the plaintiff, before commencing the action, either requested the directors to sue in the name of the corporation and had met with a refusal, or that for any reason it would have been futile to make such demand.

*It seems*, that directors of a corporation cannot be charged with moneys paid to counsel in resisting the appointment of a receiver of the corporation where it appears that the Court of Appeals materially restricted the scope of the receivership and the amount paid was reasonable.

*It seems*, that it was error to charge the executor of a deceased director of the corporation with expenditures made by other directors after the testator's death.

*It seems*, that a director who did no wrongful act and did not participate in making alleged illegal payments cannot be charged with liability merely because he was a director at the time.

**APPEAL** by the defendants, Crandall & Godley Company and others, from a judgment of the Supreme Court in favor of the plaintiff's testatrix, entered in the office of the clerk of the county of New York on the 31st day of August, 1916, upon the decision of the court after a trial at the New York Special Term.

*James J. Allen* of counsel [*Edgar T. Brackett, William E. Bennett* and *Hiram C. Todd* with him on the brief], for the appellants.

*W. Russell Osborn* of counsel [*David Bennett King* with him on the brief], for the respondent.

SCOTT, J.:

This is a representative action by a stockholder of the Crandall & Godley Company, in behalf of said corporation against one of the living directors and the executors of a deceased director, to recover moneys of the corporation said to have been illegally disbursed by its directors.

The judgment appealed from directs the executors of Lyman F. Pettee, deceased, who, until August 22, 1910, was a director of the corporation, to repay to it about \$50,000, claimed to have been illegally paid as "additional salaries" to certain stockholders who were also officers or employees in the years 1895 and 1896, and upwards of \$21,000 being sums (with interest) claimed to have been illegally paid out for counsel fees in defending a former action brought by Elizabeth McM. Godley. The defendant Finkenstadt (who has died since this action was begun) is held liable to repay upwards of \$28,000 claimed to have been illegally paid for premiums on surety bonds and counsel fees.

There is a fundamental objection to the maintenance of this action, and the affirmance of the judgment entered therein, and that is the total absence of allegation or proof that the plaintiff had before commencing the action either requested the then directors of the corporation to sue in its name, and had met with a refusal, or that for any reason it would have been futile to make such a demand. In fact the complaint does not even state who the directors of the corporation were when the action was begun. In *O'Connor v. Virginia Passenger & Power Co.* (184 N. Y. 46, 52) Chief Judge CULLEN wrote as follows: "In a derivative action of the character of the present one 'the complaint should allege that the corporation, on being applied to, refused to prosecute, and that this averment constitutes an essential element of the cause of action' [citing cases]. The complaint alleges no such demand or refusal. The general rule is subject to this exception, that where facts are alleged showing that the demand would be unavailing, a demand is unnecessary [citing cases]. \* \* \* Nor is the allegation that the new directors were 'subservient to the domination and dictation of said Frank Jay Gould and Helen Miller Gould' sufficient to prove that they would not prosecute against the Goulds a well-founded cause of action. It is not

necessarily through dishonest or improper motives that persons may be subject to the domination and dictation of others. If the directors were the same as those who committed the wrongs, or if they were acting fraudulently, dishonestly or collusively with the Goulds for the purpose of defrauding the corporation in the latter's interest, it was very easy to say so and there is no reason why the charge should not be explicitly and unequivocally made. In *Brewer v. Boston Theatre* (104 Mass. 378) the allegation was 'that [a majority of] the present board of directors of said defendant corporation are [acting] in the interest of and [are] under the control of said Tompkins and Thayer.' This was held insufficient, the Supreme Court saying: It does not 'show that such an application upon a suitable representation of [the] facts, would [be] unavailing.' "

This rule of pleading is well established and has frequently been followed. (*Brown v. Utopia Land Co.*, No. 2, 118 App. Div. 364, 366; *McCoy v. Gas Engine & Power Co.*, 135 id. 771.)

It may be that there were perfectly cogent reasons why the plaintiff considered that it would have been useless to make a demand on the corporation to bring the action, but if so there is no reason, as Chief Judge CULLEN said in the case from which we quoted, why those reasons should not have been explicitly and unequivocally stated in the complaint. This objection was taken by defendants at the opening of the case and a motion made to dismiss the complaint as insufficient. The motion was denied, but it should have been granted and the exception to the refusal to grant it presents reversible error.

What we have said is sufficient to warrant a reversal of the judgment appealed from, but it may not be amiss to say that apart from this point, which may be considered as in a measure technical, there are other serious objections to the affirmance of the judgment which suggest doubt as to its validity on the merits, at least in its entirety. The defendants present two objections to the recovery for alleged illegal salaries paid in 1895 and 1896. One is that these items might have been, but were not, included in the relief sought in a former action by Elizabeth McM. Godley against the Crandall & Godley Company and its directors (153 App. Div. 697; 212 N. Y. 121). The judgment in that action, which has been

paid, included like illegal salaries paid in 1897 and succeeding years, and the defendants' contention, for which there is much support in the cases, is that claims of this nature may not be split up and prosecuted in successive actions. The second objection urged against this particular item of recovery is that the claim is barred by the Statute of Limitations. Both of these contentions would merit at least serious consideration if the judgment were otherwise unimpeachable.

There is included in the judgment a sum of money paid to counsel in resisting the appointment of a receiver of all of the assets of the defendant corporation. This resistance was justified in the event because the Court of Appeals very materially restricted the scope of the receivership, and it is conceded that the amount of the counsel fees paid was reasonable. We think that the plaintiff failed to establish the illegality of this payment. It is true that representative actions by stockholders are presumptively in favor of and not in antagonism to the corporation, which is made a defendant merely in order that an appropriate decree can be made by which it will reap the benefit of a recovery. Ordinarily, therefore, there will be no occasion to spend considerable sums of the corporation's money to defend against an action brought for its benefit. Cases may arise, however, where the interests of the corporation are injuriously threatened by such a suit, or by some incidental relief sought therein. In such a case the directors may properly employ and pay counsel in behalf of the corporation, assuming the burden, if the expenditure is questioned, of showing that some interest of the corporation was in fact threatened and that, for that reason, the expenditure was justified, and upon the question of justification the judgment of the directors as to the necessity for the expenditure, if exercised honestly and in good faith, is not open to question in an action which is predicated not upon errors of judgment, but upon allegations of bad faith and dishonesty. To appoint a receiver of all the assets of a corporation is ordinarily a serious matter, and the directors are not to be charged with wastefulness merely because they resisted such a receivership. (*Barnes v. Newcomb*, 89 N. Y. 108; *People v. Commercial Alliance Life Ins. Co.*, 148 id. 563.) We are also of the opinion that so much of the judgment as

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charged the executors of Lyman F. Pettie with expenditures made by the directors after his death is clearly unwarranted.

As to the amount recovered against the defendant Finkenshtadt for counsel fees and insurance premiums paid out, there appears to be no evidence of any wrongful act upon his part in that he actively participated in making the payments. He appears to have been held liable solely because he was a director at the time the judgments were made. This does not seem to be sufficient. (*People v. Equitable Life Assurance Society*, 124 App. Div. 714, 732.)

For the reasons already stated it is unnecessary to consider in greater detail the objections to the detailed items of the recovery. For the insufficiency of the complaint in the respect already pointed out the judgment appealed from must be reversed and the complaint dismissed, with costs in this court and the court below. Since no findings of fact are necessary when the complaint is dismissed for insufficiency, all of the findings of fact will be reversed, and no new findings made.

CLARKE, P. J., LAUGHLIN, DOWLING and SHEARN, JJ., concurred.

Judgment reversed, with costs, and complaint dismissed, with costs.

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GEORGE B. MORSS, Appellant, v. FREDERIC B. ALLIN and CATHERINE F. MORSS, Individually and as Trustees under the Last Will and Testament of JOHN B. MORSS, Deceased, and GOTHAM NATIONAL BANK OF NEW YORK, Respondents.

First Department, December 31, 1917.

**Will construed — gift with subsequent provision postponing time of enjoyment — creation of trust without words of gift to trustees — power in trust with power of sale.**

Where a testator, having given his wife one-third of the income of his estate for life, gave all his real and personal property to his son, save the reservation of income made to the wife, but in a subsequent clause provided that the son, on reaching his majority, should receive \$10,000 from the estate to start in business, together with two-thirds of the

income, and that on attaining the age of twenty-eight years he should receive the rest of the property and its increase upon adequately securing the income of the widow, the latter clause postponing the gift of the whole estate to the son is not invalid or ineffective on the theory that it was an attempt to cut down the previous absolute gift to the son. The latter clause does not cut down the son's estate, but merely postpones the time when he shall be entitled to possession of the property.

Where the testator appointed his wife and another person as executrix and executor of the will and appointed them trustees to carry into effect the provisions of the will and endowed them with a power of sale, a valid trust is created, although the estate was not in terms given to the executors in trust. The devise to the executors is implied.

Even if such will were construed as creating the power in trust instead of a trust estate the result would be the same as the executors were given a power of sale.

APPEAL by the plaintiff, George B. Morss, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 16th day of May, 1917, upon the decision of the court after a trial at the New York Special Term.

*Thomas G. Prioleau* of counsel [*George E. Leonard* with him on the brief], for the appellant.

*David B. Simpson* of counsel [*William B. Aitken*, attorney], for the respondents.

SCOTT, J.:

The plaintiff sues the executor and executrix of his father's estate asking that certain paragraphs of the will of the latter be adjudged to be void, and the whole estate, or at least two-thirds part of it, be paid over to plaintiff at once.

The will in question was apparently drawn by an unskilled hand, but it is none the less easily intelligible, and as we think entirely valid.

By the 1st clause the testator gives to his wife one-third of the income of his estate for life.

The disputed clauses read as follows:

"Paragraph 2. I bequeath all my personal property and devise all my real property absolutely to my minor son George B. Morss, save and except that, in paragraph 1 of the will, I reserve to my wife one-third of the income therefrom during her life.

" Paragraph 3. I appoint my said wife Catherine F. Morss and Frederic B. Allin of New York City, guardians of my said minor child George B. Morss until he come of age, and also appoint my said wife executrix and said Frederic B. Allin executor of this my last will and testament, and I also appoint them trustees of all my property to carry into effect the provisions of this will until my son George B. Morss attains the age of twenty-eight years; and to the end that this my will may not fail of its purpose, I empower my said executor and executrix and trustees aforesaid to sell and convey any portion of my land or personal property whenever and as they shall deem for the best interests of the estate.

" Paragraph 4. On my son attaining the age of twenty-one he shall receive out of my estate ten thousand dollars as a start in business life and shall receive two-thirds of the income of my estate, and so soon after attaining the age of twenty-eight years, as he shall assure by adequate security to my wife her one-third of the income of my estate my son shall receive all the rest of my property and its increase."

The objections which plaintiff makes to the validity of the will are in brief that while by the 2d paragraph the whole estate is given absolutely to him, there is an attempt, which he deems ineffective, in the subsequent paragraphs to cut down the estate, and further that since the will contains no words of gift to the executors, no valid trust is created.

These objections we consider unfounded. It is true that in the 2d paragraph the testator gives the whole estate to his son, and if the will contained nothing further the latter would be entitled to its immediate possession. It was within the power of the testator, however, to postpone the period at which the estate should vest in possession and this he has done by providing that \$10,000 should be paid to the son when he should arrive at the age of twenty-one years, and the remainder so soon after he arrives at the age of twenty-eight years (which has not yet occurred) as he should assure by adequate security the payment of one-third of the income to the widow for her life. There is clearly no illegality in this provision which does not even cut down the son's estate, but merely postpones the time when he shall be entitled to possession of the property.



As to the trust provision contained in the 3d and 4th paragraphs it is true that the testator does not in terms give the estate to his executors in trust, but in every other particular a valid and conventional trust is created. In such a case the devise to the executors in trust will be implied, as has frequently been done in similar cases. (*Marx v. McGlynn*, 88 N. Y. 357; *Close v. Farmers' Loan & Trust Co.*, 195 id. 92; *Mee v. Gordon*, 187 id. 400.) Even if the provisions of the will were to be construed as creating a power in trust, instead of a trust estate, the result would be the same for there is now little or no real difference in substance or effect between a power in trust, and a trust estate except that in the case of a power the trustee does not hold the legal estate, a matter which is of no consequence in the case of this estate since the executors, as such, are given a power of sale. (Consolidators' note to Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 96; *Tilden v. Green*, 130 N. Y. 29, 53.)

We find no legal objection to the will in question, and the judgment appealed from is, therefore, affirmed, with costs.

CLARKE, P. J., SMITH, PAGE and SHEARN, JJ., concurred.

Judgment affirmed, with costs.

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In the Matter of the Transfer Tax upon the Estate of  
SHEFFIELD PHELPS, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;  
WILLIAM M. JOHNSON and CLAUDIA LEA PHELPS, as  
Executors and Trustees, etc., of SHEFFIELD PHELPS,  
Deceased, Respondents.

First Department, December 31, 1917.

**Tax — foreign bank stock owned by deceased non-resident — agreement of foreign legatees for private settlement of estate — when such agreement continues executors and trustees in their representative capacity — when shares of stock which will go to deceased non-resident legatee not taxable in this State.**

Where the legatees of a testator who died a resident of a foreign State, who are themselves non-residents, entered into an agreement with the executors and testamentary trustees wherein it was recited in substance

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that a private settlement of the estate was preferred to a judicial settlement thereof, and that the executors and trustees should set aside securities to pay annuities "in accordance with the terms of said will," and should form the trust estate thereby created and should convert the assets of the estate into money or otherwise manage the same so that ultimately a division could be made among the residuary legatees as the condition of the estate would warrant, and that the trustees who held sundry securities of a character which might not be approved by the court or authorized by law as investments, might retain such securities as in their judgment they might deem for the interest of the estate and to invest or reinvest the proceeds of such securities and should not be liable for any loss or depreciation which might occur unless from their fraudulent misconduct or default, etc., and the trustees, holding stock of a national bank in this State upon which they paid a transfer tax, sold the same and subsequently bought similar stock of the same bank which they held as assets of the estate, the proportionate share of the value of said stock or the amount thereof which might be distributed to one of the residuary legatees is not subject to a transfer tax in this State on the death of said non-resident legatee. This, because under the agreement the executors and trustees continued to hold the estate as representatives of the testator and not as agents of the legatees, and the share of said stock which would go to the legatee was a mere chose in action in favor of one non-resident against another and is not taxable in this State.

Said stock is not subject to taxation although the executors of the testator now propose to make a distribution among the legatees in specie instead of selling the stock and distributing the proceeds.

PAGE, J., dissented, with opinion.

APPEAL by the Comptroller of the State of New York from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 23d day of May, 1917, declaring the interest of Sheffield Phelps in certain shares of the stock of a national bank to be exempt from taxation under the laws relating to taxable transfers of property.

*John B. Gleason* of counsel [*Schuyler C. Carlton* with him on the brief], *Lafayette B. Gleason*, attorney, for the appellant.

*Henry W. Jessup*, for the respondents.

SCOTT, J.:

Sheffield Phelps, who died in December, 1902, was the son and a residuary legatee under the will of William Walter Phelps who died in the year 1894. Both William Walter

Phelps and Sheffield Phelps were at the dates of their respective deaths residents of the State of New Jersey. William Walter Phelps died possessed of certain personal property in the State of New York, including 350 shares of the capital stock of the National City Bank, and on July 24, 1901, an agreement was arrived at between his executors and the State of New York whereby the taxable value of his personal property within this State and the amount of tax payable thereon was fixed, and the tax was subsequently paid.

Under the will of William Walter Phelps, John J. Phelps, William E. Bond and Thomas R. White, Jr., were appointed executors and trustees of his estate, and Sheffield Phelps and others were named as residuary legatees. The will was duly admitted to probate, but on July 18, 1894, an agreement was entered into between said executors and said legatees which recited that the parties deemed it "undesirable and inexpedient to have an inventory of said estate filed or the account of said executors and trustees presented to the Orphans' Court for allowance and settlement, but prefer to have a private accounting and settlement made of the affairs of said estate." The agreement then provided that the executors should prepare and file in their own office, but not in the surrogate's office, an inventory of the estate, and should keep proper books of account, but were not to present any account in the Orphans' Court unless three of the legatees, or their legal representatives, should require an account so to be filed. The agreement then proceeded as follows:

"*Fifth.* The said parties of the second part shall proceed with the administration of the said estate and the discharge of their duties as such executors and trustees, by payment of all debts, expenses and legacies; and shall in accordance with the terms of said will set aside the securities required for the annuities mentioned therein; and shall also form the trust estates thereby created; and shall retain and set aside sufficient securities of said estate wherewith to keep up the administration and care of the Teaneck estate as directed in said will, and to pay the taxes, assessments and other expenses incident to the ownership and management of the other real estate belonging to said testator, and shall also set aside and reserve sufficient funds to provide for the

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payment of any contingent liabilities or other possible obligations of said estate and the cost of administration thereof; and shall proceed to convert the other assets of said estate into money, or otherwise manage the same, so that ultimately a division can be made amongst the residuary legatees; and from time to time, as the condition of said estate will warrant, will make a partial distribution of said personal estate amongst the parties entitled thereto; and in case any of said reserved funds or securities shall not be further required for the purpose for which they are reserved, then will divide and distribute the same in like manner.

"*Sixth.* The said parties of the first part further agree and direct that the several annuities, payable by the terms of said will, and the interest and income of the trust funds to be formed respectively for the testator's daughter Marian and for his son Sheffield, shall begin to accrue and run from the date of the testator's death, and said parties of the second part may advance from time to time such sums on account of such income as they may deem advisable, to be charged against the interest, payable out of said trust funds when the same shall be formed.

"*Seventh.* And whereas the assets of said estate consist in part of sundry stocks, bonds or other securities of a character which might not be approved by the Court or be authorized by law as proper investments by executors or trustees, but which cannot be disposed of without sacrifice or disadvantage to said estate and it may become desirable or advantageous to invest the funds of the estate in other securities of similar character, the said parties of the first part do further agree that it shall be lawful for said parties of the second part, as executors, to retain any such stock, bonds, securities or other personal estate of said deceased, as in their judgment may be proper and for the interest of said estate, and to invest and reinvest the proceeds of any securities, or money, or proceeds of sale of any real estate, in such other stocks, bonds or securities as they may deem proper and for the best interest of said estate, only upon the concurrence of all of said executors, and in so doing said party of the second part shall not be liable for any loss, depreciation or other impairment of said securities, or of

the funds or property of the estate, and shall only be liable and accountable for the loss arising from their wilful or fraudulent misconduct or default; each being responsible for his own misconduct or default and not one for the misconduct or default of another."

Other provisions followed which are not relevant to this discussion, including a provision for the payment of salaries and commissions to the executors.

The estate has continued to be administered by the executors and trustees of William Walter Phelps, deceased, pursuant to the will and the terms of the above-quoted agreement, and from time to time as funds became available for that purpose partial distributions were made among the legatees.

The shares of National City Bank stock owned by William Walter Phelps at the time of his death had all been sold and disposed of by the executors prior to the death of Sheffield Phelps, but the said executors and trustees had from time to time invested the funds of the estate in other shares of the same stock, and held of said last-mentioned stock in December, 1902, when Sheffield Phelps died, 2,625 shares, of which 988 have since been distributed to the legatees.

At the present time John J. Phelps, the sole surviving executor of and trustee under the will of William Walter Phelps, deceased, holds 1,637 shares of the capital stock of the said National City Bank, all of which has been purchased since the death of William Walter Phelps and which he wishes to distribute among the legatees and their legal representatives, including the executors of the will of Sheffield Phelps, deceased.

At first the said surviving executor proposed to sell the said stock and to distribute the cash proceeds thereof, but at the request of the parties interested as distributees it was deemed inadvisable that the stock should be converted into cash, but was desired that it should be distributed in kind. The bank, however, declined to transfer the stock upon its books to the several distributees unless and until a waiver should be executed by the State Comptroller. As to the stock proposed to be distributed to the executors of Sheffield Phelps, deceased, the State Comptroller declined to execute a waiver, contending that said stock must be

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deemed to have passed under the will of said Sheffield Phelps, and, being stock of a corporation domiciled in this State, was subject to taxation under the Transfer Tax Act.

The determination of this appeal depends, in the last analysis, upon the status of the executors and trustees named in the will of William Walter Phelps, deceased, after the execution of the agreement above quoted from. If by that agreement they held the estate merely as agents of the several distributees, so that their possession of the funds and securities in which those funds were invested was the possession of the several legatees, then Sheffield Phelps at his death was the owner of a proportionate share of the stock of the National City Bank concerning which this controversy has arisen, and that proportion is properly taxable in this State. If, however, the executors and trustees of William Walter Phelps continued, as well after the agreement was made as before, to hold the assets of the estate as executors and trustees, the only right Sheffield Phelps had at his death respecting the said shares, or any other portion of the estate, was to demand that a distribution be made, and that his proportionate share be paid over or delivered to him. This would have been a mere chose in action in favor of one non-resident against another and would not be taxable in this State.

In our opinion the latter construction of the agreement of July 18, 1894, is manifestly the correct one. The primary purpose of the agreement, as is shown by a careful reading, is to leave the executors of William Walter Phelps unhampered in their administration of the estate and to relieve them from the necessity, unless a certain number of the residuary legatees desired otherwise, of submitting their inventory and accounts to the Orphans' Court. This was doubtless deemed to be as much for the benefit and convenience of said legatees as of the executors. Beyond this the agreement proposed no change in the status of the executors, but on the contrary expressly provided that they should "proceed with the administration of the said estate and the discharge of their duties as such executors and trustees by payment of all debts, expenses and legacies." There is no word in the agreement, as we read it; which indicates that the parties to it intended and understood that they were then making a distribution of the

estate among the residuary legatees. On the contrary, it is expressly stated that one purpose of the agreement was, "so that *ultimately* a division can be made amongst the residuary legatees," and meanwhile "from time to time, as the condition of said estate will warrant," that the executors and trustees shall "make a partial distribution of said personal estate amongst the parties entitled thereto; and in case any of said reserved funds or securities shall not be further required for the purpose for which they are reserved, then will divide and distribute the same in like manner."

In our opinion this agreement did not in any way change the status of the executors and trustees, and until an actual distribution was made, whether partial or complete, the title and right to possession of the securities in which the estate was invested remained in the executors and trustees, and consequently no securities which said executors and trustees have purchased with the funds of the estate and held at the death of Sheffield Phelps, belonged to him or passed to his executors under his will. All that these latter executors succeeded to was what Sheffield Phelps had at his death, which was an equitable, undivided interest in his father's estate, and the right to call upon the executors to make distribution to him.

The question should not be beclouded because the surviving executor of William Walter Phelps now proposes to make distribution in specie, instead of selling the stock and distributing the proceeds. The result is precisely the same. The real and only question is whether Sheffield Phelps owned these particular shares of stock when he died, being a non-resident. We think it clear that he did not.

Neither of the cases relied upon by the State Comptroller is in point. In *Matter of Clinch* (180 N. Y. 300) the controversy arose over the right of a non-resident son to an interest in an undivided estate of a *resident* father, and it was held that although the son's interest at the time of his death in his father's estate was merely a chose in action, the *situs* of the estate in this State determined its taxability. In the present case both the father and son were non-residents and the *situs* of the father's estate was in a foreign State.

In *Matter of Wright* (214 N. Y. 714) the securities claimed

to be taxable were at the time of the death of the testatrix situated in this State and taxable herein. This case would have been parallel if the shares of stock to be presently distributed had belonged to William Walter Phelps at his death, which they did not, or had been distributed to and were owned by Sheffield Phelps at his death, which they had not been.

The order appealed from is right and must be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., SMITH and SHEARN, JJ., concurred; PAGE, J., dissented.

PAGE, J. (dissenting):

In my opinion the transfer of the shares of stock in the National City Bank by the death of Sheffield Phelps is subject to taxation under the laws of this State. It was entirely competent for the heirs and next of kin of William Walter Phelps to agree among themselves as to the distribution of the estate without administration. When they paid the debts and legacies, and created the trusts provided for by the will, and designated the same persons that were nominated in the will to execute the trusts, there was no one who could complain. The real and personal estate vested in them at the death of the testator. In the absence of a statute requiring the estate to be administered under judicial supervision, and it is not claimed that there is such a statute in New Jersey, a resort to the courts was not necessary. In such a case there are no executors of the will; for while the testator may nominate, the court alone can appoint, an executor. An executor is not vested with any title or power until he becomes so vested by letters testamentary. The effect of the agreement made by the heirs and next of kin was that the estate which had vested in them at the death of the testator should be held in common and not presently distributed, and certain persons were appointed as their agents to manage the property for them. That the persons employed as agents were the same as those who had been nominated by the testator makes no difference; they are not thereby vested with the powers that attach to the office of executor. We are not concerned with the trusts created by the will, but solely with the rights of the residuary legatees, and, therefore, it is not neces-



sary on this appeal to consider the bearing of questions that might arise in that behalf. I have assumed that letters testamentary were not issued to the executors, as there is no allegation in the record that such letters were issued. If as a matter of fact letters were duly issued, when the executors and trustees sold the securities or property of the residuary estate and reinvested it under the power vested in them by the agreement, they held the securities in which the investment was made, not in their capacity as executors or trustees of the estate, but as the agents of the residuary legatees.

The stock of the National City Bank, which is the subject of this proceeding, was so purchased; and hence, although held in the names of the persons named as the executors and trustees of the estate, it was not in fact held by them as such executors and trustees. The money which was realized by the sale of the property of the estate, if paid over to the residuary legatees, would not have been taxable in this State. The reinvestment of this money by or on behalf of the residuary legatees does not reincorporate the stock into the estate of William Walter Phelps. Therefore, the transfer of this stock to the estate of Sheffield Phelps is not taxable as the transfer of an asset of the estate of his father.

In my opinion, at the time of Sheffield Phelps's death, his proportionate share of the National City Bank stock was held for him by his agents. Although, to make adjustment of the agency dealings and a proper distribution of the property held by the agents among the copartners, an accounting might be necessary, this did not make Sheffield Phelps's right to the property a mere chose in action. (*Matter of Houdayer*, 150 N. Y. 37; *Matter of Newcomb*, 71 App. Div. 606, 608; affd., on opinion below, 172 N. Y. 608.) Property held by an agent is the property of the principal, and possession of the agent is the possession of the principal. Therefore, these shares of stock are to be treated in this proceeding as though the stock stood in the name of Sheffield Phelps, and is taxable. (*Matter of Newcomb*, *supra*.)

The order of the surrogate should, therefore, be reversed, with costs, and the matter remitted to the Surrogate's Court to be sent to an appraiser.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Judicial Settlement of the Account of Proceedings of WILLIAM BUTLER DUNCAN, Deceased, as Executor, etc., of MARTHA MALVINA WILLIAMS, Deceased, by WILLIAM BUTLER DUNCAN, JR., and Others, Executors, etc., of Said WILLIAM BUTLER DUNCAN, Deceased.

In the Matter of the Judicial Settlement of the Account of Proceedings of WILLIAM BUTLER DUNCAN, JR., and Others, as Executors, etc., of WILLIAM BUTLER DUNCAN, Deceased, with Regard to the Administration of the Estate of MARTHA MALVINA WILLIAMS, Deceased.

GEORGE PEABODY WETMORE, Individually and as Executor, etc., of ANNIE WETMORE SHERMAN, Deceased, and Others, Appellants; WILLIAM BUTLER DUNCAN, JR., and Others, as Executors, etc., and Others, Respondents.

First Department, December 31, 1917.

**Decedent's estate — executors of deceased executor — right to an accounting and relief from custody of unadministered estate — practice — administrator with will annexed should be appointed — executors of executor cannot be burdened with distribution of estate.**

The executors of a deceased executor are entitled to a judicial approval of the accounts of their testator and to relief from the custody of property left unadministered by him. Of such property they are merely custodians without the executorial powers which appertained to their testator.

Such executors of a deceased executor have no power to collect or distribute the prior estate which power should be vested in an administrator with the will annexed.

Although the deceased executor was judicially directed to make certain distributions to creditors, the decree is not binding upon the executors of the deceased executor to the extent of burdening them with the duty of making such distribution and it is doubtful whether they would have power to do so.

Where there is no administrator with the will annexed, the proper way to provide for the distribution of unadministered assets among the creditors of a brother of the testatrix is to order the assets turned over to the receiver of the estate of said brother, who should realize on them and make proper distribution.

**APPEAL** by George Peabody Wetmore, individually and as executor, and others from a decree of the Surrogate's Court

of the county of New York, entered in the office of said Surrogate's Court on or about the 2d day of April, 1917, in so far as it overrules certain contentions made by the appellants.

*Henry H. Man*, for the appellants.

*Francis Smyth* of counsel [*Thomas B. Gilchrist* and *Russell Stiles* with him on the brief], *Cadwalader, Wickersham & Taft*, attorneys, for the respondents.

SCOTT, J.:

We are of the opinion that under the circumstances of this case, the order appealed from was right. The accountants are the executors of an executor and as such seek the judicial approval of the accounts of their testator, and relief from the custody of the property left unadministered by him. Of such property they are merely the custodians possessing with respect thereto none of the executorial powers and functions which appertained to their testator as executor. (Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 121, as added by Laws of 1909, chap. 240; *Matter of Hayden*, 204 N. Y. 330.) They are not the successors of their testator as executor and have no power either to collect or to distribute the estate. Such power would be vested in an administrator *c. t. a.*, if one were appointed, but none has been appointed and apparently none of the parties in interest desire that one should be appointed. At least no move in that direction appears to have been made.

In our opinion the judgments of the Supreme Court relied upon by the appellants, in so far as the now deceased executor of the estate of Martha M. Williams, deceased, was directed to make distribution to the creditors of Stephen C. Williams, deceased, are not binding upon these accountants and they should not be burdened with the duty of making such distribution, even it were legally possible for them to do so, which is at least doubtful.

In the absence of an administrator *c. t. a.* of the estate of Martha M. Williams, deceased, the obvious and only practical way to provide for the distribution of the unadministered assets of her estate among her brother's creditors is to order those assets to be turned over to the receiver of

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the estate of said brother whose right and duty it will be to realize upon the assets and make proper distribution thereof.

The order appealed from is right and must be affirmed, with ten dollars costs and disbursements to the petitioners, respondents.

CLARKE, P. J., LAUGHLIN, DOWLING and SHEARN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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MARY IRWIN, Respondent, v. FRANKLIN SIMON, Defendant,  
Impleaded with J. J. STEINDLER COMPANY, Appellant.

First Department, December 31, 1917.

**Negligence — failure of owner of building to equip stairway with handrail — evidence raising issue under Labor Law — erroneous submission of issue as to common-law liability — new trial necessary where general verdict rendered after erroneous submission of issue.**

Action to recover damages for personal injuries received by the plaintiff who, while employed in a building used for the manufacture of wearing apparel, fell down a winding stairway which lacked a rail upon one side. Evidence examined, and *held*, that it was proper to submit to the jury the question as to whether the building was a factory within the meaning of the Labor Law and that a finding on that issue in favor of the plaintiff should not be disturbed.

*Held further*, that there was no evidence sufficient to justify the court in submitting to the jury, in addition to the liability of the defendant under the Labor Law, the question as to whether the defendant, who was owner of the building, had failed to perform a common-law obligation to provide and maintain a reasonably safe stairway.

As the jury found a general verdict for the plaintiff and may have founded the same upon the issue erroneously submitted, the judgment must be reversed and a new trial ordered.

SCOTT, J., dissented, with opinion.

APPEAL by the defendant, J. J. Steindler Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of February, 1917, on the verdict of a jury

for \$8,000, and also from an order entered in said clerk's office on the 8th day of March, 1917, denying said defendant's motion for a new trial made upon the minutes.

*Lyman A. Spalding* of counsel [*Walter J. Rosenstein* with him on the brief], for the appellant.

*William F. Delaney* of counsel [*George J. Gillespie* with him on the brief], *Gillespie & O'Connor*, attorneys, for the respondent.

DOWLING, J.:

Plaintiff has recovered for the second time a verdict against the defendant J. J. Steindler Company. The judgment entered on the first verdict was reversed by this court upon a prior appeal because of the erroneous admission of testimony. (170 App. Div. 811.) The facts are fully discussed in that opinion and it is unnecessary to restate them, as the record before us is not materially different from the former one. As the result of the determination of this court just cited, the submission to the jury of the question as to whether the building wherein the accident occurred was a factory within the meaning of the Labor Law was proper, nor should their finding thereupon be disturbed. Necessarily involved in that finding is the question of defendant's duty of compliance with the provisions of the Labor Law and particularly with section 80 thereof, requiring that proper and substantial handrails shall be provided on all stairways in factories. (Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 80.)\* Upon that theory of the case, there still remained for determination the questions (1) whether the defendant's violation of its statutory duty was the proximate cause of the injuries sustained by plaintiff, and (2) whether plaintiff was free from negligence contributing to her injuries. But upon the present trial the case was submitted to the jury by the learned trial court, not only upon the theory of defendant's liability because of its violation of a statutory duty to provide handrails upon the stairway in question, but also upon the

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\* Repealed by Laws of 1913, chap. 461, § 2. Now Labor Law, § 79c, subd. 1, as added by Laws of 1913, chap. 461.—[RER.]

theory of defendant's liability because of its failure to perform its common-law duty to provide and maintain a reasonably safe stairway, inasmuch as it had retained, as owner of the building, the maintenance, care and control of the hallways, stairs and stairways of the building (including the stairway in question) which were used in common by all the tenants on the premises and their employees, plaintiff being the employee of one of the defendant's tenants. Defendant by exceptions and by its requests to charge, duly raised the question as to the erroneous submission to the jury of the alleged liability of defendant at common law. We are of the opinion that there was not sufficient evidence of any negligence of defendant at common law to warrant submitting that issue to the jury for determination. There was sufficient evidence to warrant submitting to the jury the issue as to defendant's liability under the Labor Law. The jury found a general verdict for plaintiff, and there is no way of determining upon which of these theories they predicated liability. Under these conditions, as the jury may have found for plaintiff upon the erroneously submitted theory of defendant's alleged liability at common law, for which no basis existed, the judgment appealed from must be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN and SHEARN, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

The only serious objection to the affirmance of the judgment appealed from (apart from the size of the verdict) is that the court erroneously submitted the case to the jury with instructions that it might find defendant liable either at common law, or under the Labor Law, whereas upon the evidence the case should have been submitted under the Labor Law alone.

I fully appreciate the force of the general rule that when a case has been submitted to a jury upon two theories, one of which is supported by the evidence, and the other of which is not, and a general verdict is rendered, the judgment should not be sustained because it is impossible to determine which theory of the case the jury acted upon. But that

general rule should be applied with discretion. In the present case the evidence was ample to sustain a recovery by plaintiff under the Labor Law.

The building in which the accident occurred was clearly a "tenant-factory" as defined in section 94 of the Labor Law (Consol. Laws, chap. 31; Laws of 1909, chap. 36), and the stairway was as clearly unprovided with "proper and substantial" handrails. (Labor Law, § 80.)\* In fact for part of the way there were no handrails at all. So much the jury must have found from the evidence, and so finding the defendant was shown to be *prima facie* guilty of negligence, and this was sufficient to justify a verdict, the happening of the accident, the damage to plaintiff and her freedom from contributory negligence having been found by the jury as they must have been found to justify a verdict upon any theory of the case.

It seems to me to be going very far to assume that the jury may have disregarded the plain violation of the Labor Law disclosed by the evidence, and have resorted to the common law to find a foundation for charging the defendant with negligence, if indeed (which is very doubtful) it appreciated the distinction between liability under the Labor Law and liability at common law.

The plaintiff has now had two trials and has succeeded in both. Her first judgment was reversed for an error in the admission of evidence. It is now proposed to reverse her second judgment for an error in the charge which I cannot help thinking should be disregarded as immaterial. There can be no doubt, I think, that the plaintiff has shown herself to be entitled to some recovery, and that if a new trial be had without error in the admission of evidence and with an unimpeachable charge by the court she will again recover. We are constrained by section 1317 of the Code of Civil Procedure to "give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." Under the circumstances of the case the error in the charge of which I have spoken cannot be

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\* Repealed by Laws of 1913, chap. 461, § 2. Now Labor Law, § 79c, subd. 1, as added by Laws of 1913, chap. 461.—[Rep.]

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said, in my opinion, to have affected the substantial rights of the parties.

I do think, however, that the verdict was much too large. I am, therefore, in favor of reversing the judgment and ordering a new trial, with costs to appellant to abide the event, unless she will stipulate that the recovery be reduced to \$4,000, in which event the judgment, as modified, should be affirmed.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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ELSIE BARBARA ROSENBUSCH, by HENRY C. ROSENBUSCH,  
Her Guardian ad Litem, Appellant, v. AMBROSIA MILK  
CORPORATION, Respondent.

First Department, December 31, 1917.

**Negligence — artificial food product — failure of manufacturer to warn customer of possible deterioration — liability of manufacturer for injuries caused by deteriorated food.**

The manufacturer of an artificial infant food, which is widely sold in sealed packages, is chargeable with negligence where it knows or should know that the product is liable to deteriorate and become dangerous to health, either by time, climate or temperature, or by the manner in which it is kept, if he fails to affix to the package the date of manufacture and the time during which the ingredients may safely be used, or the manner in which they should be handled and preserved to prevent deterioration. Hence, where such information is not affixed to the package, an infant who was made ill by being fed on the product, which had deteriorated and become poisonous, may recover damages.

*It seems, however, that the mere vendor of patent medicines or other preparations not manufactured or prepared by him, is not liable to third parties for injuries therefrom without proof of negligence on his part.*

APPEAL by the plaintiff, Elsie Barbara Rosenbusch, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 12th day of March, 1917, upon a dismissal of the complaint by direction of the court at the close of the plaintiff's case.

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*Edward Potter* of counsel [*Thomas A. McCole* and *Michael Potter* with him on the brief], *Sykes, McCole & Potter*, attorneys, for the appellant.

*John M. Gardner* of counsel [*Gardner, Tyndall & Barton*, attorneys], for the respondent.

LAUGHLIN, J.:

The action was brought to recover for personal injuries sustained by the infant plaintiff alleged to have been caused by the negligence of the defendant.

The defendant is a domestic corporation and it was engaged in manufacturing and selling to wholesale dealers a food product known as "Mammala." "Mammala" was designed, according to the representations made by the defendant on the cans in which it prepared it for the market and on circulars, principally as a substitute for milk for infants.

On the 9th day of July, 1914, when plaintiff was about three months old she was taken ill. The family physician was summoned and he ordered a change of diet. She had been taking Horlick's Malted Milk from the time she was three days old and he prescribed "Mammala" as a substitute. "Mammala" was put up by the defendant in sealed tin cans holding about a quart. It was represented by the manufacturer to be pure cow's milk of the best quality, modified for babies and invalids by removing part of the cream and adding milk-sugar and then dried rapidly by a scientific process known as "Hatmaker" which it represented kills all disease germs "and renders it absolutely safe and highly suitable for baby and invalid feeding." It is in powder form. A printed formula prescribing the number of feedings and the quantities to be given at each according to the weight of the baby after the fifth day was on the outside of each can. "Mammala" was sold by defendant to wholesale dealers and by them to druggists. The mother, following the advice of the physician, purchased a can of "Mammala" at a neighboring drug store and continued to feed the plaintiff thereon until the twenty-eighth day of July. In the meantime eight or nine cans had been consumed and the plaintiff thrived thereon. Another can was likewise purchased and within ten or fifteen minutes after the feeding therefrom the mother

gave the plaintiff a teaspoonful of castor oil, on the advice of the physician, she claims, which he, however, denies, and within about ten minutes thereafter the plaintiff was observed to be in convulsions. The family physician was summoned and he attributed the condition of the child to poisoned food and diagnosed the condition of suffering in which he found the child as "gastritis from poisonous food."

Counsel for the respondent while contending that the defendant is not liable for the condition of the "Mammala" at the time it was administered to the plaintiff, also claims that no permanent or other injuries were shown to have resulted from the use of it and that, therefore, in any event there was no basis for the recovery of damages. The evidence does not show any permanent injury, but it sufficiently shows that the child was poisoned by the "Mammala" and that the castor oil was not a contributing cause and that she suffered therefrom for some considerable time. On that branch, therefore, a case was made for the consideration of the jury.

The plaintiff rested on proof that she was poisoned by the "Mammala" thus prepared and placed on the market by the defendant. She offered no other evidence tending to show negligence on the part of the defendant, excepting the representations made by it on the labels and in circulars. There is, therefore, no express evidence that the "Mammala" was in the same condition when administered to the plaintiff as when it was placed in the can by the defendant. This presents a novel, interesting question of law as to whether the evidence was sufficient to make out a *prima facie* case of negligence on the part of the defendant. No precedent precisely in point has been cited or found. It has been held that where one is poisoned or injured by food purchased at a restaurant, or by bread, or by milk, proof of that fact alone is sufficient to place the burden upon the proprietor of the restaurant, the manufacturer of the bread or the vendor of the milk to show the exercise of all due care on his part (*Leahy v. Essex Co.*, 164 App. Div. 903; *Race v. Krum*, 162 id. 911; 163 id. 924; *Freeman v. Schultz Bread Co.*, 100 Misc. Rep. 528; *Cook v. People's Milk Co.*, 90 id. 34; *affd.*, 175 App. Div. 966); and it has also been held that one who prepares poisons or medicines and places them on the

market under a false label or without disclosing the composition of the medicine and recommends its use for indicated maladies is presumptively liable to any one injured thereby. (*Thomas v. Winchester*, 6 N. Y. 397; *Willson v. Faxon*, *Williams & Faxon*, 208 id. 112; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 459.) It is also well settled in this jurisdiction that one who manufactures an appliance or machine of any kind which is inherently dangerous is presumptively liable for negligent construction to another injured thereby without proof of any contractual relation between them (*MacPherson v. Buick Motor Co.*, 217 N. Y. 382; *Torgesen v. Schultz*, 192 id. 156; *Stalter v. Ray Mfg. Co.*, 195 id. 478); and that one who negligently builds or constructs or repairs a dangerous appliance or structure from which others are liable to receive injury is presumptively liable without regard to any contractual relation. (*Rosenfeld v. Smith & Son, Inc.*, 180 App. Div. 691; *Devlin v. Smith*, 89 N. Y. 470; *Burke v. Ireland*, 26 App. Div. 487; *Kahner v. Otis Elevator Co.*, 96 id. 169; *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573; *affd.*, 146 N. Y. 363.) The mere vendor, however, of patent medicines or other preparations not manufactured or prepared by him doubtless is not liable to third parties for injuries therefrom without proof of negligence on his part. (*Glaser v. Seitz*, 35 Misc. Rep. 341; *Bruckel v. Milhau's Son*, 116 App. Div. 832.) In the case at bar there is no charge in the complaint that the "Mammala" in question was in the same condition when prepared by defendant as when used by the plaintiff, but the plaintiff charged generally and proved that defendant manufactured and exploited "Mammala" as a food for babies guaranteed under the Food and Drugs Act, June 30, 1906,\* under the serial number 47,970, and represented and guaranteed to the consumers that it was free from harmful consequences, and that it knew that the ingredients if permitted to deteriorate would become imminently dangerous to the life and health of the consumer and that it took no precaution to prevent the sale thereof after the ingredients had deteriorated and become rancid, rotten and decomposed as was the "Mammala" in question. I am of opinion that it will

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\* See 34 U. S. Stat. at Large, 768, chap. 3915.—[Rmp.]

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not be an unreasonable extension of principles of liability already established to hold that the manufacturer in such case is chargeable with negligence where it knows or should know that the product is liable to deteriorate either by time, climate or temperature or the manner in which it is kept, if it fails to affix to the package the date of manufacture and the time during which the ingredients may safely be used or the manner in which they should be handled and preserved to prevent deterioration. There is no suggestion on the labels on the cans of "Mammala" that the contents are subject to deterioration in any of the respects stated or otherwise, and even the date of manufacture is not given. The representations in the labels and in the circulars under which the defendant has advertised this product and induced the public to buy it contain numerous representations that it is absolutely safe and may be administered to babies and invalids and convalescents in the doses prescribed without harmful results, and there is no suggestion that the product is subject to deterioration from any cause; in short, it is represented that it is a safe and wholesome food for babies, invalids and convalescents. The defendant's circular contains one express representation that "Mammala" is not affected by changes of temperature, for consumers are urged as a matter of convenience and economy to use it because "it is a dry powder which does not require ice for its preservation," and it is also expressly represented that it "is sold by all druggists in sealed boxes." The circular is replete with assurances that "Mammala" is so prepared that it may be used with perfect safety. Counsel for the respondent repeatedly states in his points that it is well known that "Mammala," being a dried milk product, is subject to deterioration if not properly cared for after leaving the hands of the manufacturer. The labels which the defendant placed on the cans and the circulars are calculated to convey an impression, if not an assurance, to the contrary. Doubtless defendant knew and chemists would know whether or not it was subject to deterioration, but mothers in general and those intrusted with the care of babies could not be presumed to possess such knowledge or to know that it was unsafe to use "Mammala" without first taking it to a chemist for analysis, and if that were neces-

sary the defendant would not sell much of it. If it be true that it is so subject to deterioration then the defendant in its circulars and labels should have drawn attention to this danger by limiting the time within which it should be used or prescribing the manner in which it should be handled and kept, and for its failure so to do I think it is answerable on the theory of negligence. These views are in the main sustained, I think, by a paragraph in the opinion of the Court of Appeals in *MacPherson v. Buick Motor Co.* (*supra*), wherein Judge CARDOZO, writing for the court and pointing out the necessity for the extension of the doctrine on this general subject, said: "We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." We extend the rule by making it also the duty of the manufacturer to issue with such a food product proper instructions with respect to its preservation and use to insure the safety of its use if they are observed.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

FIRST NATIONAL BANK OF PHILADELPHIA, PENNSYLVANIA,  
Respondent, v. THE NATIONAL PARK BANK OF NEW YORK,  
Appellant.

First Department, December 31, 1917.

**Bills and notes — presentation of check through clearing house and tentative entry thereof on books of drawee — return of check on notice of insolvency of drawer — when no acceptance which entitles payee to recover of drawee — estoppel — custom of clearing house.**

Where the plaintiff, a bank named as payee of a check drawn upon the defendant bank, forwarded the instrument to its correspondent for collection and the correspondent presented the check through the New York clearing house, of which the drawee was also a member, and the drawee on receiving the check through the clearing house made a tentative entry thereof on its books, but did no unequivocal act indicating an intention to pay the check and returned it the same day to the correspondent bank on learning that the drawer had been taken over by the banking department of a foreign State, the payee is not entitled to recover on the theory that the drawee had irrevocably accepted the check.

On the facts aforesaid there is no estoppel as between the payee and drawee, as the latter neither canceled the check, nor marked it paid, nor retained it. The plaintiff not being a member of the New York clearing house, is not bound by the constitution and rules of that institution.

APPEAL by the defendant, The National Park Bank of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of May, 1917, upon the decision of the court after a trial before the court, a jury having been waived, and also from an order entered in said clerk's office on the 21st day of May, 1917, denying defendant's motion for a new trial and for leave to reopen the case.

*Louis F. Doyle*, for the appellant.

*Percy S. Dudley* of counsel [*Joseph S. Clark* with him on the brief], for the respondent.

LAUGHLIN, J.:

The recovery was on a check drawn by the Mutual Trust Company of Orange, N. J., on the defendant for \$18,231.66, to the order of the plaintiff. The plaintiff forwarded the

check to its correspondent, the Hanover National Bank of New York, for collection. The Hanover Bank and defendant were members of the New York Clearing House and presentment was made through the clearing house, the rules of which provide for tentative settlements between the customers at the clearing house in the morning according to the claims of the respective customers with respect to the aggregate amount of the checks drawn on the other members which they then and there present and deliver in envelopes or packages marked with the amount to representatives of the other members; but the constitution and rules of the clearing house as construed by the clearing house committee seem to require the redemption by any member of any check thus paid through the clearing house and returned to it for any reason before three o'clock in the afternoon of the same day. The check in question was thus first paid through the clearing house on presentment there to representatives of the defendant in the manner stated, without, however, having been examined by them and without their knowing whether the account of the drawer was good for the amount. On presentation and delivery of the checks at the clearing house the representatives of each member then send them to their bank for examination. This may precede or follow the tentative settlement at the clearing house but such settlement is not affected thereby. On receipt of the checks at the bank on which they are drawn they are separated and a slip is first made of the items drawn by each depositor and from this another slip is made showing the *aggregate* amount of the items drawn by each depositor and that is sent to the book-keeper in charge of the ledger balances of the depositors before the checks have been examined with respect to their regularity and genuineness and he at once makes a tentative entry in red ink of this aggregate amount in the charging or debit column of the balance ledger account. That was done in this case and that constitutes the only entry shown to have been made in the books of the defendant with respect to this check. The drawer's balance at that time was sufficient to pay the check. It does not appear definitely at what hour the examination of this check was made nor was it clearly shown that it was passed as regularly drawn. At

about one-thirty p. m. defendant was notified by the State Banking Department of New Jersey that it had taken charge of the Mutual Trust Company of Orange and of its affairs under the statutes of New Jersey that morning and formal notice in writing to that effect was received by it from said State Banking Department at about two-thirty p. m. That was in effect a notice to stop payment of checks drawn by the Mutual Trust Company. (*Columbia-Knickerbocker Trust Co. v. Miller*, 156 App. Div. 810.) The defendant thereupon erased the entry made in its balance ledger account with respect to this check and returned it to the Hanover Bank before three o'clock and demanded payment pursuant to the rules of the clearing house, and the amount of the check for which the Hanover Bank had received credit on the tentative settlement through the clearing house was repaid to defendant and the Hanover Bank took back the check and erased the indorsement thereon to the effect that it had been paid through the clearing house. The check was thereafter presented to defendant and payment was refused.

It appears that the defendant kept an account known as an account current with its correspondents in which the items are entered from day to day, but that account was not offered in evidence, and there is no evidence that any any entry was made therein with respect to this check.

Neither the plaintiff nor its collecting agent, the Hanover Bank, had any notice or knowledge with respect to said entry made by defendant in its balance ledger account unless it be on the theory claimed by counsel for respondent that the defendant in receiving the check at the clearing house became the agent of the owner to present it to itself for payment and that as such agent it had knowledge of what it did as the drawee of the check and that its principal, the owner, is presumed to have such knowledge. It is a little difficult to follow that theory, but in view of the fact that the only entry shown to have been made was not a final entry it is not necessary to express a decided opinion on the point at this time.

There is no evidence of estoppel as between the plaintiff and the defendant. The check was neither canceled nor marked paid nor retained by defendant.



The plaintiff contends that it is not bound by the constitution and rules of the clearing house as it is not a member thereof and that claim is sustained by the decision in *Columbia-Knickerbocker Trust Co. v. Miller* (215 N. Y. 191). The plaintiff, however, claims that acting under the rules of the clearing house the defendant undertook to present the check to itself for payment and that while it then had a right to reject it for any reason the same as it would have had a right to refuse payment as between it and the owner of the check, had the check been presented at the counter of the bank, still that by passing on the check to the extent shown and making the entry in the balance ledger account it manifested its intention to pay the check and to ratify the payment thereof which it had already made tentatively through the clearing house, and that its action became irrevocable. In support of that contention counsel for plaintiff relies upon *Columbia-Knickerbocker Trust Co. v. Miller* (*supra*) and *Baldwin's Bank v. Smith* (215 N. Y. 76) and kindred cases. Those decisions in view of the facts on which the adjudications were made are not necessarily controlling in the ultimate decision of the issues herein, but in both of them and in other cases cited and relied upon by the respondent the rule is stated to be that payment may be shown by the intention to make it evidenced by some unequivocal act such as bookkeeping entries or by the cancellation of a note or check and marking it paid, and in *Baldwin's Bank v. Smith* it was held that a direction to a bank by the maker of a note after the receipt of the note by the bank to pay and charge it to his account with a verbal agreement on the part of the bank that that would be done constituted a payment even though the bookkeeping entries were not made. This court, in *Hentz v. National City Bank* (159 App. Div. 743), prior to the two decisions of the Court of Appeals already cited, expressed the opinion that payment through the clearing house "is not a payment of any particular check and does not become so until the time within which the check may be returned has expired." Judge HAND, after those decisions by the Court of Appeals, which he considered, expressed views to the same effect. (*Eastman Kodak Co. v. National Park Bank*, 231 Fed. Rep. 320.) We do not deem it necessary at this

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time to decide whether that statement of the rule must be deemed modified by the subsequent decisions of the Court of Appeals to which reference has been made, for even under the rule as stated by the Court of Appeals no unequivocal act on the part of the defendant indicating its intention to pay the check was shown in the case at bar and since the evidence does not show whether or not there were other entries made by the bank concerning this check which may afford a basis for a recovery by the plaintiff, we think there should be a new trial to the end that the facts may be fully developed.

The appeal from the order should be dismissed, without costs, and findings numbered VII, VIII and XII, which are inconsistent with these views, and the conclusions of law and judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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JANE GREY, Respondent, v. TRIUMPH FILM CORPORATION,  
Appellant.

First Department, December 31, 1917.

**Master and servant — action for breach of contract employing actress — evidence raising question for jury — evidence tending to show motive of defendant — erroneous refusal to charge.**

Action brought by the plaintiff, an actress employed in the production of motion picture films, to recover damages for an alleged wrongful discharge by her employer before the expiration of the term of her employment. It is claimed by the plaintiff that she was compelled by the defendant to do additional work in order to provoke a controversy and to afford a pretext for her discharge, while the defendant contends that the plaintiff was insubordinate and refused to perform her obligations under the contract. Evidence examined, and held, that the case presented issues of fact for the determination of the jury.

It was competent for the plaintiff to show that the defendant had no further use for her services at the time of the discharge owing to the fact that the moving picture film had been completed and to show that

in placing the additional work upon her the defendant was not acting in good faith. But such evidence was competent only to enable the jury to determine the credibility of witnesses upon the issue as to whether the plaintiff was insubordinate and whether the defendant was justified in discharging her.

In such action it was reversible error to decline to charge, at the request of the defendant, that if the plaintiff was guilty of a refusal to perform her duty, or of insubordination, the defendant was justified in discharging her, irrespective of any question of good faith.

APPEAL by the defendant, Triumph Film Corporation, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of April, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of April, 1917, denying defendant's motion for a new trial made upon the minutes.

*I. Maurice Wormser* of counsel [*Leon Laski* with him on the brief], for the appellant.

*Arthur F. Driscoll* of counsel [*Dennis F. O'Brien* with him on the brief], *O'Brien, Malevinsky & Driscoll*, attorneys, for the respondent.

LAUGHLIN, J.:

On the 14th day of February, 1916, the plaintiff entered into an agreement in writing with the defendant, a corporation engaged in manufacturing and producing motion picture films, wherein it is recited that plaintiff is an actress of exceptional and extraordinary ability, and whereby defendant employed her for fifteen consecutive weeks from February 21, 1916, at \$500 per week to enact the title role in the production of motion pictures and plays to be selected by it and she agreed to devote her entire time and attention to enacting the title roles and to give her best services thereto.

On the afternoon of the fifth day of the fourth week after, as plaintiff claims, all the scenes in which she was to act in a play called "The Surrender" had been finished, she was requested by one Golden, under whose direction the pictures had been taken, to act in an additional fireplace scene. While the picture of that scene was being taken a controversy arose between her and Golden concerning which

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the testimony is conflicting. On the part of the plaintiff it is claimed that the taking of the scene was planned to provoke a controversy and to afford a pretext for her discharge in order to relieve defendant from the payment of her weekly salary as it then had no further play to produce; and on the part of defendant it is claimed that plaintiff was insubordinate and failed to obey its lawful directions and refused longer to perform her obligations under the contract. She was not, however, discharged that day. She testified that the next morning she was ready to resume her duties but that defendant did not send an automobile for her as it usually had done; that she thereupon telephoned to Golden who claimed, in effect, that she had abandoned the contract the day before, which she denied, but that when he told her what he claimed she had said the day before she stated to him that if she had said it she apologized and was ready to proceed; that he refused to permit her to resume her duties and referred her to Mr. Steger, the president of the defendant, who requested her to call at his office at five o'clock that afternoon, which she did, and that he then told her, in effect, that she was not at fault, and that Golden only was responsible for the disagreement, and he also informed her that they had no other play for her to act in for the present. Her testimony on these points is controverted, but the uncontroverted evidence shows that the following Monday she received a notice in writing in the name of the company, signed by Steger, discharging her for her failure to report for duty on Saturday and for insubordination and failure and refusal to obey reasonable rules and regulations and for discourteous and insulting treatment of the director and officials of the company and for extravagant demands and frequent violation of other terms of the contract. Her salary for the first three weeks had been paid and a check for five-sixths of the fourth week's salary was inclosed with the notice of discharge but she returned it.

The plaintiff brought an action in the Supreme Court for damages for the wrongful discharge and at the same time sued in the Municipal Court for the fourth week's salary. The latter action was consolidated with the former before the trial.

The case presented issues of fact for the determination of the jury. The evidence tending to show that defendant had no further use for plaintiff's services at the time of the discharge, and that in requiring the fireside scene it was not acting in good faith, was material and competent to enable the jury to determine the credibility of witnesses on the issue as to whether plaintiff was insubordinate or, in other words, upon the issue as to whether she acted properly and as directed, as she claimed, or whether defendant was justified in discharging her, as it claimed. That evidence, however, had no other legitimate bearing and should have been confined to that issue. On this point the learned trial justice, doubtless inadvertently, fell into error. In the body of the main charge, after properly and very clearly instructing the jury that defendant was justified in discharging plaintiff and she was not entitled to recover if she was guilty of insubordination of any kind, the court said: "But if there was in fact no disobedience, if you find, in fact, that there was no insubordination and that she performed such services required of her as she could reasonably be expected to perform, in that event she is entitled to be compensated for the damage she has sustained in consequence of the breach of this contract. Having in mind all the evidence adduced during the course of this trial, you may say whether the discharge was in good faith for a violation of duty, or whether it was a scheme of the defendant to be rid of an expense which could bring no return until a new play had been acquired. The burden of proving this, as I have said to you, is upon the defendant." By these instructions the jury may have inferred that even though plaintiff was insubordinate and defendant might have discharged her therefor, if it acted in good faith in so doing, yet that it could not take advantage of her insubordination to rid itself of liability under the contract unless it acted in good faith. Evidently, with a view to having the jury set right on that point counsel for defendant requested the court to instruct the jury "that if the plaintiff was guilty of a refusal to perform her duty, or guilty of insubordination, either or both, in the way in which the court defined those terms in its charge to the jury, then the defendant was justified in discharging the plaintiff and the question of good

faith has absolutely nothing to do with the case." To this request the court replied: "I decline to so charge." No further instruction was given on that point. We are of opinion that the defendant was entitled to have the jury instructed as requested. The request embodied a correct proposition of law (26 Cyc. 995; 20 Am. & Eng. Ency. of Law [2d ed.], 32; *Jackson v. New York Post Graduate, etc., Hospital*, 6 Misc. Rep. 101; *Wood Mast. & Serv.* [2d ed.] 235, 236; see, also, *Corrigan v. E. M. P. Producing Corp.*, Nos. 1 & 2, and cases cited, 179 App. Div. 810), clearly expressed, which was applicable to the case and quite appropriate in view of what the court had said in the main charge, as already stated.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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STAFFORD HENDRIX, Appellant, v. MANHATTAN BEACH DEVELOPMENT COMPANY and CHAUNCEY MARSHALL, JR., Respondents.

First Department, December 31, 1917.

**False imprisonment — assault — malicious prosecution — complaint stating action for false imprisonment only — arrest without warrant — delay in taking person arrested before magistrate.**

Action to recover damages for alleged assault, false imprisonment and malicious prosecution. The plaintiff was employed by the defendants to sell tickets at a bathing pavilion and, it is alleged, was arrested by the defendants without legal process, or probable cause, and maliciously imprisoned and assaulted, etc., and was brought before the magistrate upon the false charge of selling tickets bearing a date which rendered them worthless, etc. Complaint examined, and *held*, insufficient to charge the defendants with liability for assault.

A mere charge that the defendants assaulted the plaintiff is a mere conclusion and not a statement of facts sufficient to authorize a recovery for assault.

*Held further*, that the complaint did not allege facts necessary to sustain an action for malicious prosecution in that it does not appear that the legal prosecution terminated favorably to the plaintiff.

Where the plaintiff alleged that he was held by the magistrate and found guilty by the Court of Special Sessions it will be inferred that he received a suspended sentence. The plaintiff must allege what is tantamount to the termination of the criminal prosecution favorably to him.

*Held further*, that the complaint contained allegations sufficient to sustain the action as one for false arrest and imprisonment in that plaintiff was arrested for a misdemeanor without legal process, in which case the arrest could only be justified if the crime were committed in the defendants' presence. The burden of showing the latter fact is upon the defendants.

Even if the arrest of the plaintiff were lawful it cannot be held as a matter of law that there was no unnecessary delay in taking him before a magistrate, or delivering him to a peace officer, as required by section 185 of the Code of Criminal Procedure. Such unnecessary delay makes the arrest unlawful regardless of whether or not the plaintiff was guilty of crime.

APPEAL by the plaintiff, Stafford Hendrix, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 15th day of March, 1917, dismissing the amended complaint on the pleadings, and also from an order entered in said clerk's office on the same day granting defendants' motion for judgment on the pleadings, consisting of the amended complaint and a demurrer thereto.

The judgment appealed from was entered pursuant to the said order.

*William F. Unger* of counsel [*Goldman, Heide & Unger*, attorneys], for the appellant.

*Arthur E. Goddard* of counsel [*Cullen & Dykman*, attorneys], for the respondents.

LAUGHLIN, J.:

The provisions of the Code of Civil Procedure which require that the complaint shall contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition, and that where the complaint sets forth two or more causes of action the statement of the facts constituting each must be separately stated and numbered (Code Civ. Proc. §§ 481, 483), seem to have been disregarded in drafting the complaint. It contains two counts to recover the same amount of damages, and in each the same facts are

alleged and no others, with the exception that in the second count it is alleged that the bath ticket (which it is alleged in both counts defendants, in an information filed in the Magistrate's Court upon which plaintiff was held for the Court of Special Sessions and subsequently tried, charged plaintiff, as its agent to sell bath tickets, with having sold on a day after the date for using it had expired and when it was valueless and worthless, owing to the fact that it had been previously sold by defendants and was no longer owned by them) was never thereafter used by any one. So far as appears by the allegations in either count, the plaintiff was neither arrested nor held nor tried on the charge, or upon any issue involving the charge, that the ticket so sold was used by any one. Therefore, this allegation in the second count added nothing of materiality to the allegations of the first count, and both counts are in legal effect the same.

The defendants demurred jointly, not to the counts separately, but to the entire amended complaint, on the ground that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action.

The complaint is most indefinite, but it is claimed and may be gleaned therefrom that the pleader intended to charge causes of action for false arrest and imprisonment and for assault and for malicious prosecution. As the case is presented, however, we are concerned only with the question as to whether the plaintiff has alleged any cause of action.

It is alleged that the defendant company was a domestic corporation engaged in operating a bathing pavilion at Brighton Beach, in the borough of Brooklyn, New York; that it employed plaintiff to sell tickets which entitled the holder to a bath; that by a printed notice on the tickets they were good only for the day on which they were purchased; that on the evening of the 8th of September, 1912, defendants without any warrant or legal process wrongfully, unlawfully and without reasonable or probable cause, maliciously imprisoned the plaintiff in a pen or cage at or near the bathing pavilion for about two hours, and abused, insulted, humiliated and assaulted him while he was so imprisoned; that at the expiration of said imprisonment, defendants without any warrant



or legal process, forced plaintiff against his will into an automobile owned by defendant Marshall and carried him as a prisoner through the public streets to the Sheepshead Bay police station, and there publicly and unlawfully assaulted and searched him and publicly humiliated and disgraced him, and without warrant or legal process kept him as a prisoner in a cell in said police station over night without food; and the next morning, likewise without any warrant or legal process, continued his imprisonment by taking him through the public streets to the Magistrate's Court at Coney Island, without having down to that time filed any charge against him; that defendants then and there knowingly, wrongfully and maliciously caused a false charge to be made against the plaintiff, which was vitally defective and did not state the commission of any crime, and was, therefore, void and of no effect and conferred upon the Magistrate's Court no jurisdiction; that no testimony was taken before the Magistrate's Court, but the court, acting arbitrarily and without jurisdiction and wholly upon an invalid and defective information which defendants presented, held plaintiff to answer before the Court of Special Sessions; that in said information defendants charged the plaintiff with having sold to one of the patrons of the bath a ticket bearing the stamp "Good only on date purchased," which was an earlier date than that on which he sold it; that the information did not state a crime, for the reason that the ticket was worthless and of no effect and had ceased to be the property of the defendants; that plaintiff was innocent of the charge and had not committed any of the acts charged, as defendants well knew; that thereafter, at the instigation of the defendants, plaintiff was brought up for trial before the Court of Special Sessions; that the information which was presented to the Court of Special Sessions differed in "certain essential respects from the information which had been presented to the Magistrate" and "stated a different charge than that upon which the plaintiff was held for the Court of Special Sessions and was itself invalid;" that as a result of the trial before the Court of Special Sessions "an invalid finding of guilty was entered against the plaintiff, and plaintiff was remanded and imprisoned without valid warrant or legal process and held without bail for six days,

and then discharged without judgment;" that as no judgment was entered against the plaintiff it was impossible for him to appeal and that he is without remedy except by this action; that in all of the matters alleged defendants "acted maliciously and wilfully and without reasonable or probable cause, well knowing that the plaintiff was not guilty of any crime," and that the ticket which defendants charge the plaintiff with having sold "was valueless and worthless and had previously been sold by them and was no longer owned by them;" that by reason of these acts of the defendants the plaintiff was injured in his good name and credit and suffered in body and mind by reason of the disgrace attendant thereon, and was subjected to expenses and disbursements and counsel fees aggregating \$6,800, and has sustained damages in the premises in the sum of \$25,000.

These allegations constitute an insufficient statement of facts, if it was intended to charge the defendants with liability for an assault made upon the plaintiff after he was arrested and imprisoned at the bathing house, or while in the automobile, or in the police station, or on the way from the station to the Magistrate's Court. The mere charge that the defendants assaulted the plaintiff is a conclusion and not a statement of facts sufficient to authorize a recovery for an actionable assault within the provisions of section 481 of the Code of Civil Procedure, which require a plain and concise statement of the facts constituting the cause of action. (*Shapiro v. Michelson*, 19 Tex. Civ. App. 615; 47 S. W. Rep. 746; *Connelly v. American Bonding & Trust Co.*, 113 Ky. 903; 69 S. W. Rep. 959; *Stivers v. Baker*, 87 Ky. 508; 9 S. W. Rep. 491; 5 C. J. 650.)

If it was intended to allege an action for malicious prosecution the facts stated are insufficient, for it does not appear that the prosecution has terminated favorably to the plaintiff. It is alleged that he was held by the magistrate and found guilty by the Court of Special Sessions; and the fair inference from the facts alleged is that the sentence was suspended. The alleged want of jurisdiction of the magistrate and court which tried the plaintiff, and insufficiency of the informations, are conclusions without the allegation of the requisite facts to support them, as is also the allegation that the information

on which he was tried was not the same in effect as the one on which he was held. The plaintiff must allege what is tantamount to termination of the criminal prosecution favorably to him. (*Robbins v. Robbins*, 133 N. Y. 597; *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141; *Halberstadt v. New York Life Ins. Co.*, 194 N. Y. 1; *Reit v. Meyer*, 160 App. Div. 752.) The case of *People v. Fabian* (192 N. Y. 443), relied on by plaintiff in support of his contention that a finding of guilty without a judgment passing sentence is not a conviction within the contemplation of the constitutional provisions, is not in point, for it does not hold that a verdict or finding of guilt is a termination of the prosecution in favor of the accused. Counsel for the plaintiff contends that a sufficient cause of action for malicious prosecution is alleged and he cites in support of his contention *Johnson v. Girdwood* (7 Misc. Rep. 651; *affd.* on opinion of General Term of the Common Pleas, 143 N. Y. 660); *Mesnier v. Denike* (82 App. Div. 404); *Nicholson v. Sternberg* (61 *id.* 51); *Beall v. Daddirrian* (62 Misc. Rep. 125; *affd.* on opinion of Special Term, 133 App. Div. 943), and *Dennis v. Ryan* (65 N. Y. 385). In *Johnson v. Girdwood* (*supra*) it was held that a conviction alleged to have been brought about by duress and conspiracy on the part of the defendants does not bar an action for false arrest or malicious prosecution, and that the judgment of conviction, not being between the same parties, is open to impeachment on those grounds; and the other authorities cited tend to sustain that proposition. In *Cuniff v. Beecher* (84 Hun, 137) it was held that a conviction was a bar to an action either for false imprisonment or malicious prosecution unless it be shown that it was brought about through fraud or conspiracy participated in by the court as well as the defendants, but doubtless, in view of the decision in *Johnson v. Girdwood*, it would not be essential to warrant the impeachment of the conviction as a bar to such an action to show that the court participated in the fraud or conspiracy. In this complaint, however, there are no facts alleged to impeach the conviction of the plaintiff in the Court of Special Sessions. It is not alleged that the conviction was brought about by fraud or conspiracy on the part of the defendants or by false testimony given by them or in their behalf or at their instance.

The only remaining theory for sustaining the complaint is that a false arrest and imprisonment are sufficiently shown. It is not alleged what charge or that any charge was made against the plaintiff when he was first arrested and imprisoned. It is, however, alleged that the defendants caused the arrest and imprisonment of the plaintiff without warrant or other legal process, and that he was guilty of no crime and, in effect, that they detained him against his will for upwards of two hours without delivering him to a peace officer or taking him before a magistrate; and that they then took him to the police station and there caused him to be imprisoned over night without warrant or other legal process. I am of opinion that these allegations are sufficient to sustain the action as one for false arrest and imprisonment. On no theory could the crime, if committed by the plaintiff, be more than a misdemeanor, and arrest therefor by the defendants without a warrant could only be justified if the crime was committed in their presence. (Code Crim. Proc. § 183.) That is not to be inferred from the allegations of the complaint; and the burden would be on the defendants to show it (*Adams v. Schwartz*, 137 App. Div. 230; *Cousins v. Swords*, 14 id. 338; *affd.*, 162 N. Y. 625; *Ackroyd v. Ackroyd*, 3 Daly, 38; *Shaw v. Jayne*, 4 How. Pr. 119), but even if the arrest of the plaintiff was lawful, it cannot be said as matter of law that there was no unnecessary delay in taking him before a magistrate or delivering him to a peace officer, as required by section 185 of the Code of Criminal Procedure. If there was such unnecessary delay, then the arrest itself became unlawful on the theory that the defendants were trespassers *ab initio* and so continued down to the time when the plaintiff was lawfully held under a warrant of commitment, regardless of whether or not the plaintiff was guilty of any crime. (*Pastor v. Regan*, 9 Misc. Rep. 547; *Snead v. Bonnoil*, 49 App. Div. 330; *affd.*, 166 N. Y. 325; *Tobin v. Bell*, 73 App. Div. 41; *Davis v. Carroll*, 172 id. 729. See, also, *Davern v. Drew*, 153 App. Div. 844; *affd.*, *sub nom. Davern v. Breen*, 214 N. Y. 681.) We are of opinion, therefore, that without regard to whether or not the plaintiff was found guilty on the charge on which he was arrested, a sufficient cause of action for false arrest and imprisonment is shown.

It follows that the judgment and order should be reversed with costs, and motion for judgment on the pleadings denied, with ten dollars costs, but with leave to defendants to withdraw the demurrer and move or plead over on payment of the costs of the appeal and motion.

CLARKE, P. J., DOWLING and PAGE, JJ., concurred; SMITH, J., concurred in result.

Judgment reversed, with costs, and motion denied, with ten dollars costs, with leave to defendants to move or plead over as stated in opinion.

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THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JAMES A. GARRITY, Appellant, *v.* WILLIAM A. WALSH, City Judge of Yonkers, Respondent.

Second Department, December 21, 1917.

**Court — municipal corporations — city judge of Yonkers is city officer — vacancy in said office may be filled by appointment by mayor — city judge, although appointed, not elected, may remove probation officer — removal of veteran fireman from said office must be on charges and after hearing.**

The city judge of the city of Yonkers is a city, not a State officer, and the mayor of said city, not the Governor of the State, has the power to fill a vacancy in said office by appointment.

A city judge of the city of Yonkers, although appointed to fill a vacancy and not elected by the people, has power to appoint probation officers. But where a veteran volunteer fireman has been appointed to the position of chief probation officer of the Court of Special Sessions in the city of Yonkers, as said position is classified in the competitive class by the municipal civil service commission with the approval of the mayor and of the State Civil Service Commission, said probation officer cannot be removed without charges and without a hearing at the pleasure of the city judge.

APPEAL by the relator, James A. Garrity, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 28th day of August, 1917, denying his application for a peremptory writ of mandamus.

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*Ralph Earl Prime, Jr., for the appellant.**George V. Wallin, for the respondent.*

THOMAS, J.:

The appellant was appointed in 1909 chief probation officer by the city judge of Yonkers, and was removed in 1917 by the defendant, who, by reason of a vacancy in the office of city judge of the City Court of Yonkers, had been appointed to that position by the mayor of the city of Yonkers. Appellant contends (1) that the city judge is not an officer of the city of Yonkers, and, therefore, the mayor had no power to appoint Walsh to the vacancy, but that the appointment rests with the Governor; (2) that if Walsh was city judge, it was by appointment, and that appellant could be removed only by a "city judge elected;" (3) that appellant had been a volunteer fireman appointed to the position of chief probation officer of the Court of Special Sessions, a position classified in the competitive class of the civil service by the municipal civil service commission, which classification was approved by the mayor, and by the State Civil Service Commission, and that he was removed without charges, or facts justifying charges, and without hearing. The appellant urges that the City Court of Yonkers and the Court of Special Sessions are not courts of the city, but are inferior local courts of the State of New York, and that the city judge who presides in such courts is not a city officer. Chapter 452 of the Laws of 1908 is "An act to supplement the general laws relating to the government of the city of Yonkers, and to revise and consolidate the local laws relating thereto." It continues "The city of Yonkers," sets its bounds and bounds its wards, describes the powers of the common council, and contains the provisions appropriate to the charter of a city. Article 2, section 1, provides: "There shall be elected by the qualified electors of the city, in addition to such other officers as are or may be provided by law, a city judge and four justices of the peace. The term of office of the city judge shall be six years and the term of the justices of the peace shall be four years. The city judge and the four justices of the peace now in office shall continue in office for the remainder of the

terms for which they were respectively elected. The city judge shall be an attorney of the Supreme Court of the State of New York, and shall be and continue a resident of the city of Yonkers during his term of office." Section 4 (Art. 2) provides: "Any elective officer, except city judge and justices of the peace, may be removed from office for misconduct or malversation in office by the Governor in the same manner as sheriffs." Then the section provides that justices of the peace may be removed for cause in the same manner as are justices of the peace of towns; that a supervisor or an assessor may be removed for misconduct by the common council, and adds: "Nothing herein shall restrict the right of removal otherwise vested in any board or officer of the city, but the powers herein conferred shall be additional to any such other provisions for removal." Article 13 provides for a "department of the judiciary." Section 1 thereof declares that "The court of criminal jurisdiction now existing in the city of Yonkers, known as the Court of Special Sessions, is hereby continued," with the powers of such courts and further powers "hereinafter provided," and then this: "The city judge of Yonkers shall be the judge of the City Court of Yonkers and also judge of the Court of Special Sessions, and as judge of said Court of Special Sessions shall have jurisdiction, exclusive of any justice of the peace, within the corporate limits of the city, to issue all criminal process, and all process other than in civil actions." Section 2 defines the exclusive jurisdiction of the city judge to try offenses, and provides: "The city judge *elected* may appoint such number of clerks, stenographers, interpreters, assistants, and other attendants as may be prescribed by the board of estimate and apportionment. \* \* \* All appointees of the city judge, including those in office when this act takes effect, shall hold their respective positions during the pleasure of the city judge elected," and their salary or remuneration shall be fixed by the board of estimate. Section 13 provides for designation by the mayor of "an acting city judge," and prescribes his qualifications, and when he shall serve. Section 15 deals with the powers of the city judge to impose or suspend sentence, power to release on probation under the charge of a probation officer, and then states: "The city judge

of Yonkers may appoint such number of salaried probation officers, to hold office during his pleasure, at a salary fixed by the board of estimate and apportionment as may be prescribed by the board of estimate and apportionment upon the recommendation of the city judge, and may include one or more female probation officers. The said city judge may appoint from time to time, to serve at his pleasure, and without compensation, such additional number of probation officers as he may deem desirable." Section 16 regulates the duties of the probation officer, provides for his reporting to the city judge, and ends: "Each probation officer appointed by the city judge shall perform such further duties as shall be designated or required of him by said judge." The survey of the charter should be considered in connection with the act in relation to cities of the second class. The Second Class Cities Law (Consol. Laws, chap. 53; Laws of 1909, chap. 55) provides (§ 10): "City officers, within the meaning of this chapter, include all persons elected or appointed to any office of the city created or authorized by this chapter or otherwise by law." The respondent's contention is that the words "*otherwise by law*" include the supplemental charter of Yonkers, and, therefore, the city judge for which that charter provides. Section 14 provides: "All elections of city officers, including supervisors and judicial officers of a city court or inferior local court, shall be held," etc. Section 15 is: "Vacancies. If a vacancy shall occur, otherwise than by expiration of term, in an elective office of the city, including that of supervisor, the mayor shall appoint a person to fill such vacancy." The section then provides for the duration of the term of the appointee. Appellant regards it significant that "judicial officers of a city court or inferior local court" are not mentioned, as in section 14. Perhaps it was thought that as a supervisor is usually a town officer, he should be mentioned specially. The appellant insists that the office of city judge of Yonkers was created or authorized by earlier acts, and that the supplemental charter merely declared that an already existing officer should be elected. Even so, the office of city judge of Yonkers is an "office" of the city of Yonkers "created or authorized \* \* \* by law." There had been an office of city judge of Yonkers, recognized by earlier acts.



The supplemental charter declares that a city judge shall be elected, and careful provision is made therefor. "The city judge" then in office is continued for the remainder of his term. The city judge becomes within the city of Yonkers the judge of the Court of Special Sessions, but he does not cease to be a city judge elected as the act provides. His powers as a judge of Special Sessions are somewhat defined by section 2 of article 13, but it is said: "He shall possess such other powers and perform such other duties as now are or hereafter may be conferred or imposed by law." That refers undoubtedly to the duties and powers of the existing city judge, but I cannot believe that the city judge was lifted out of the charter as a city officer and exalted to the rank of a State officer appointable in case of vacancy by the Governor. The history of the City Court of Yonkers, indicates conclusively that the judge is an officer of the city. Chapter 866 of the Laws of 1872, repealed by the supplemental charter in question (Laws of 1908, chap. 452), is "An act to incorporate the city of Yonkers," and declares (Tit. 2, § 1): "The officers of the city shall be as follows: a mayor; a city judge;" etc. The act provides that officers of the city elected by general election "shall be a mayor and city judge," and fixes the term of the city judge, states his qualifications and jurisdiction, and provides for his removal by the County Court. It was that city judge, an officer of the city of Yonkers, who was continued in the supplementary charter. By chapter 61 of the Laws of 1873 the jurisdiction of the City Court of Yonkers was enlarged, and it was made a court of record. Its civil jurisdiction was extended, and the powers and jurisdiction of the "city judge of Yonkers" were increased. Chapter 61 of the Laws of 1873 was not directly repealed in the supplemental charter, and is probably continued by that act (Art. 14, § 2). Section 2 of the Judiciary Law (Consol. Laws, chap. 30; Laws of 1909, chap. 35; formerly Code Civ. Proc. § 2) declares that "Each of the following courts of the State is a court of record," and enumerates among others the City Court of Yonkers, but it does not say that the city judge shall be other than an officer of the city. Section 2234 of the Code of Civil Procedure mentions the city judge of Yonkers. The same Code by sections 3203-3206 provides for the civil juris-

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diction of "the City Court of Yonkers." A note under these sections refers to some other sources of jurisdiction. Chapter 416 of the Laws of 1893, which I do not find directly repealed, is "An act in relation to the City Court of Yonkers." The act states the jurisdiction of the City Court of Yonkers, the powers of the city judge, makes provision for his removal by the General Term of the Second Department, and among other things deals with the subject of the clerk, marshal, the practice, jurors, trials, and provides for a stenographer of the City Court and of the Court of Special Sessions, who shall hold his office during the pleasure of the city judge. Such history indicates very clearly that the city judge is a city officer, although he existed before the supplemental charter, and that in case of vacancy he may be appointed by the mayor under the Second Class Cities Law. If the point of the learned counsel for the appellant, that the Court of Special Sessions is not a court of the city of Yonkers, be correct, it does not follow that the city judge of Yonkers, appointed by law to preside in that court, is not an officer of the city of Yonkers. A city judge is appointed to sit in the Special Sessions, and if he be an officer of the city he does not cease to be one because appointed to duty in the Special Sessions, whatever its relation to the city be. The supplemental charter does not say that the judge of the Court of Special Sessions may appoint probation officers, but that the city judge may do so. So the conclusion is reached that the city judge of Yonkers is an officer of the city, whatever may be the nature of the Court of Special Sessions in which he presides. The appellant's argument that the "city judge *elected* may appoint \* \* \* clerks, stenographers, interpreters, assistants, and other attendants," etc., and that "all appointees of the city judge, including those in office when this act takes effect, shall hold their respective positions during the pleasure of the city judge *elected*," deserves some consideration. When a person is appointed to an office to fill a vacancy he is endowed usually with the powers that belong to the occupant of the office. The use of the word "elected" in the language quoted is obscure. It could hardly be expected that, if there were vacancies in the positions of clerks, stenographers, interpreters or assistants, the judge would not have power to fill the positions. In any case, the power to appoint

probation officers is given to the city judge of Yonkers and not to the city judge elected. The office is one that has a peculiarly confidential relation to the judge, and it would seem reasonable that he should have the power to use or disuse him as he sees fit. The position of the appellant is to the effect that he is protected by the civil service laws. The appellant had no fixed term of office. His tenure depended upon the pleasure of the city judge, who, as the statute declares, "may appoint such number of salaried probation officers, to hold office during his pleasure." In *People ex rel. McNeile v. Glynn* (128 App. Div. 257) it was decided that, where the statute provided that the State Comptroller shall appoint "and may at pleasure remove" a stated number of appraisers, he may remove an appraiser at will and without charges or a hearing, although he be a veteran or fireman. Since the decision in the *McNeile* case there has been decision that must be taken into account. The position of chief probation officer was, before relator's appointment, classified by the municipal civil service commission of the city of Yonkers, to which has been added the approval of the State, and the classification continues. The question arises whether the city judge is deprived of the power, which the statute gives him, by this interposition of other officials. In other words, the supplemental charter fixed the status of the probation officer, bounded his term by the pleasure of the appointing power, and the problem is whether, in exercising his right to terminate the service, the city judge must make a charge affecting the qualification of the incumbent and upon a hearing pass upon the truth of it. That would permit civil service officers to qualify the pleasure of the city judge. But chapter 15 of the Laws of 1909, as amended by chapter 264 of the Laws of 1910 (Consol. Laws, chap. 7), prescribes that a person related to the volunteer fire service, as is the relator, should not be removed from a position by appointment or employment in a city, except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and a right of review is given. In *People ex rel. Fallon v. Wright* (150 N. Y. 444) the court enforced a statute found to involve a similar provision, and even reversed the finding of the officer exercising the right of removal after such hearing. If it be

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said that the civil service officials could not subject the relator in the present case to the civil service, the argument is met by *Matter of Simons v. McGuire* (204 N. Y. 253). Judge WERNER states: "The question is whether the probation officers, to be appointed by the justices of the Court of Special Sessions in the city of New York, are to be placed in the exempt class or in the competitive class under the Civil Service Law. The respondent, one of the appointees, and the justices of the Court of Special Sessions, assert that the position of probation officer is one which, by reason of its peculiar and manifold duties as defined in section 11a of the Code of Criminal Procedure, no less than by the express terms of the statute creating the Court of Special Sessions and defining the duties and powers of its officers, belongs in the exempt class." The opinion finally states: "The point in the case at bar is that we cannot hold as matter of law that the position of probation officer, under section 96, chap 659, Laws of 1910, is one which cannot be properly placed in the competitive class of the civil service, and for that reason the question must be left to the decision of the Civil Service Commission." Such section 96 of the Inferior Criminal Courts Act of the City of New York provides for the appointment and removal of probation officers, and declares: "The chief probation officers and all other probation officers shall be deemed the confidential officers of the justices and magistrates. The chief justice or the chief city magistrate, as the case may be, or a majority of the justices or a majority of each board of magistrates, may at pleasure remove the chief probation officer or any probation officer." (See, also, Laws of 1915, chap. 531, amdg. said § 96.) One object of placing the persons in the competitive class is to present persons from whom the appointing officer may make selection, being advised thereby of qualifications which he might not otherwise be able conveniently to obtain. But the governing decision is that the relator, holding a confidential office at the pleasure of the city judge, may be classified in the civil service so that the appointee cannot be removed at the pleasure of the officer appointing him, but only upon a decision after trial that the appointee is incompetent or has been guilty of misconduct, and there must be sufficient facts of record to sustain the

finding or it will be reversed and the appointee continued, although the city judge's pleasure is otherwise.

The order should be reversed and the application for writ granted, with fifty dollars costs and disbursements.

JENKS, P. J., STAPLETON, MILLS and PUTNAM, JJ., concurred.

Order reversed and application for writ granted, with fifty dollars costs and disbursements.

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In the Matter of the Transfer Tax upon the Estate of JOHN G. WENDEL, Deceased.

REBECCA A. D. WENDEL SWOPE and ELLA V. VON E. WENDEL, as Administratrices, etc., of JOHN G. WENDEL, Deceased, and Others, Appellants; COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

Second Department, December 21, 1917.

**Wills — construction — vested remainder — tax — transfer tax on transfers by deed in execution of power of appointment.**

Where a testator who died in 1876 devised certain lands to his son for life, with authority to appoint said lands among his issue or his sisters by deed or will, and, in case the son should leave no valid appointment or issue, devised the lands to his sisters, the sisters had a vested interest, which is not subject to a transfer tax.

Transfers by deeds executed three years prior to the death of the grantor in pursuance of a power of appointment in the will of his father who died before any statute in this State imposed an inheritance or transfer tax, are not subject to a transfer tax.

Such transfers, not being dependent on or connected with death, are clearly without the legislative intention, and beyond the purview of the statute.

SEPARATE APPEALS by Rebecca A. D. Wendel Swope and another, as administratrices, and others, from an order of the Surrogate's Court of the county of Westchester, entered in the office of said Surrogate's Court on the 17th day of April, 1917, dismissing their appeal from the appraisal of the property of John G. Wendel, deceased, and also from the order of said Surrogate's Court entered therein on the 13th day of March, 1917, fixing the transfer tax herein and affirming a supplemental report of the appraiser, and also from an order of

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said Surrogate's Court entered on the 5th day of May, 1916, upon the appeal taken by the said Comptroller from the orders of the surrogate made and entered on the 10th and 24th days of March, 1916, respectively.

*Lewis L. Delafield [George Flint Warren, Jr., and Alfred Gregory with him on the brief], for the appellants.*

*Francis A. Winslow, for the respondent.*

PUTNAM, J.:

These appeals question the power to tax transfers by deed in execution of a power of appointment in the will, made in 1875, of the deceased's father, John D. Wendel, who died in 1876 before any statute in this State imposed an inheritance or transfer tax.

John D. Wendel, by paragraph 21 of his will, devised to his son John G. Wendel certain lots in New York, "to have and to hold \* \* \* for and during his life, the rents issues and profits I devote expressly to his own use and benefit, and I authorize him to appoint the said real estate to and amongst his lawful issue or to his sisters or their issue in such share and for such Estates and on such conditions as he may think fit by deed or by Will, and in case he shall leave no such valid appointment I devise the said lots of land to his lawful issue and if he shall leave no such issue then to his sisters, their heirs and assigns in fee simple forever."

On January 23, 1911, said John G. Wendel conveyed these lands to his sisters in pursuance of this power of appointment, by separate deeds which included also his own life interest therein. They were all dated December 27, 1910, and were together recorded on January 23, 1911. The interests are differently and diversely described in these instruments. The grantees under these deeds entered into possession and thereafter received the income arising therefrom and also paid the taxes thereon. John G. Wendel, the grantor, died on November 30, 1914, intestate, and without issue.

The appraiser first treated these properties as not taxable. The surrogate, however, overruled this view, resulting in a supplemental report. The lands involved were then valued

at \$1,525,000. The calculated value of the life estate of John G. Wendel in the six properties was \$350,189, leaving as subject to tax, a capital value of \$1,174,811.

The sisters of John G. Wendel had a vested interest under the will of 1876, subject to two possibilities, the birth of issue to their brother, and the exercise of this power of appointment by which the lands might be distributed among them differently. As their interest was thus vested, it was not subject to a transfer tax. (*Matter of Pell*, 171 N. Y. 48; *Matter of Chapman*, 133 App. Div. 337; 196 N. Y. 561.)

The Transfer Tax Law, section 220, subdivision 6, provided: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." (Tax Law [Consol. Laws, chap. 60; Laws of 1909, chap. 62], § 220, subd. 6, as amd. by Laws of 1910, chap. 706.)

In 1897 there had been appended to this statute a declaration (following the policy in other States) that property passing through the failure to exercise a power of appointment was nevertheless subjected to transfer tax, the same as if the donee of the power had owned the property, and had devised it by will.\* This was held in 1905 to have been ineffective, since "Where there is no transfer there is no tax." (*Matter of Lansing*, 182 N. Y. 247.) Accordingly this provision was repealed. (Laws of 1911, chap. 732, amdg. Tax Law, § 220.)

The Legislature have validly inverted the former rule regarding the source of a title thus coming through the exercise of a power of appointment. It formerly was related back to the original instrument creating the power (*Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, 67; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 48); so that transfer taxes were at first based

\* See Tax Law (Gen. Laws, chap. 24; Laws of 1896, chap. 908), § 220, subd. 5, added by Laws of 1897, chap. 284, as amd. by Laws of 1905, chap. 368, and Laws of 1908, chap. 310; Tax Law of 1909, § 220, subd. 6, as amd. *supra*.—[R.F.P.]

on the degree of kinship between the original donor of the power and the final appointees. (*Matter of Stewart*, 131 N. Y. 274.) In 1897 we have the enactment now under consideration, that for the purpose of inheritance taxation, the transfer from the donee of the power should be deemed a transfer, (a) as if the property under the appointment belonged absolutely to the donee of such power, and (b) had been "bequeathed or devised by such donee by will." This was to lay emphasis on the last step in the devolution of interest. It was natural to have in mind powers exercised by will. The draftsman of this amendment considered an appointment exercised by will. Otherwise how could a devise or bequest furnish any standard of comparison? An appointment by deed *inter vivos* goes into immediate effect. Could legislative fiat make such grant by a living person a disposition by will?

General legislation on the subject of the transfer tax has been limited to gifts *causa mortis*, if otherwise the tax would be imposed upon rights of succession which had accrued before the statute came into existence. (*Matter of Seaman*, 147 N. Y. 69.)

Likewise, the language here cannot be taken to place deeds *inter vivos* on the footing of testamentary dispositions, which are taxed for that very reason that they are by will. On such ground appointments under a power have been taxed because by a will, and not effective until the donee's death. (*Orr v. Gilman*, 183 U. S. 278; *Matter of Vanderbilt*, 50 App. Div. 246; *affd.*, 163 N. Y. 597; *Matter of Fearing*, 200 *id.* 340.) If the creation of the power direct that it must be exercised during the donee's life, it cannot be exercised by will. Although a power was given by deed, an appointment by will was subject to tax. (*Matter of Delano*, 176 N. Y. 486; *Chanler v. Kelsey*, 205 U. S. 466.) The State's taxing power rests on transfers and successions effective through death. Had these appointments been by deed, but not to take effect till Mr. Wendel should die, they would have been taxable. But where the transfer was by deed taking full effect in the donee's lifetime, the right had been completely exercised, with no element of inheritance. The policy in other States taxing the failure to appoint, under a power, is based on



the view that the failure to act affects the course of the succession, and until such failure is complete the succession is not fully determined. (*Minot v. Treasurer & Receiver General*, 207 Mass. 588; *Montague v. State*, 163 Wis. 58.) But here the succession was complete and absolute on delivery of the deeds, and placed beyond the possibility of change at Wendel's death. Such transfers, not being dependent on or connected with death, are clearly without the legislative intention, and beyond the purview of this statute. The question whether the Legislature might lay an excise tax on the creation of a power, as an artificial privilege, and thus subject to the State's control, is not this case, where the only transfers are conveyances in the donee's lifetime. In *Matter of Keeney* (194 N. Y. 281; *affid.*, *sub nom. Keeney v. New York*, 222 U. S. 526) the taxation was on the succession upon Mrs. Keeney's death to a quarter of the income from a trust fund, which had been paid to her during her life. As this passed upon her death, it came under the State's taxing power.

The legislative purpose, however, must be gathered from the entire system — a method to levy duties imposed on property changing hands at death. Whether called death duties, or legacy duties, as in England, or *droits de mutation par décès*\* in France, the principle is to tax the State's grant of a privilege to succeed to property passing on death. Necessarily this appraisal was made as of the date of the deeds in the lifetime of Mr. Wendel. Suppose, however, Mr. Wendel had survived his appointments twenty years, instead of three years. Would the Legislature have imposed on such estate a retroactive tax based on what had long since been alienated, and possibly had passed through many successive hands? How could the executors be made personally liable for the tax until its payment, as section 224 of the Tax Law provided, over property wholly beyond their control?

In view of these incidents, there was no basis to set up as a standard of comparison a devise or bequest by will ambulatory and ineffective before the testator's death.

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\* See *Matter of Scott*; *Scott v. Scott*, L. R. (1915), 1 Ch. Div. 592.

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The execution of this power caused these lands to pass then and there. Death was not the cause nor the occasion of this succession.

Hence I advise that the orders of the Surrogate's Court of Westchester county be modified so as to exclude from the appraisal the six properties appointed by the deceased under the deeds during his lifetime, with costs of this appeal to appellants.

JENKS, P. J., THOMAS, MILLS and BLACKMAR, JJ., concurred.

Orders of the Surrogate's Court of Westchester county modified so as to exclude from the appraisal the six properties appointed by the deceased under the deeds during his lifetime, with costs of this appeal to appellants. Order to be settled on notice.

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WILLIAM PLASS, Respondent, v. WILLIAM M. BARRETT, as  
President of THE ADAMS EXPRESS COMPANY Appellant.

Third Department, December 28, 1917.

**Carriers — negligence — liability of express company for negligent delay in transportation of horses resulting in their sickness and death — evidence — effect of request by shipper for extension of period of confinement without unloading.**

In an action by a shipper against a carrier for negligence it appeared that the plaintiff shipped by an express company, of which the defendant is president, a carload of horses; that with close train connections and good management the journey might have been made within from twenty-four to twenty-eight hours, but fifty-five hours were consumed; that when the horses reached their destination they were in a weakened, enfeebled condition, one died almost immediately and four others within two weeks, three of them having developed pneumonia within a day or two after they were unloaded; that the contract released the company from all liability for delay or injuries to the said animals unless caused by the company or by the negligence of its agents or employees, and that delay was caused by defects in the cars, and there was no evidence that the company used any care by inspection or otherwise in the selection thereof.

**Held**, on all the evidence, that there was a negligent delay in the transportation of the horses causing sickness and death among them for which the

defendant is responsible, but the judgment should be modified by deducting the amount allowed for the death of two of the horses, there being no evidence connecting their death with the delay in transportation.

A request by the plaintiff pursuant to the Federal statute that the period of confinement of the animals without unloading be extended from twenty-eight to thirty-six consecutive hours, was not an agreement that the express company might consume thirty-six hours in the journey.

APPEAL by the defendant, William M. Barrett, as president of The Adams Express Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Columbia on the 9th day of April, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

*George W. Smyth and Edward V. Conwell*, for the appellant.

*Duntz & Herzberg [R. Monell Herzberg of counsel]*, for the respondent.

COCHRANE, J.:

On April 28, 1916, the plaintiff shipped by the Adams Express Company, of which the defendant is president, a carload of twenty-six horses and two mules from Circleville, O., to Linlithgo, N. Y. With close train connections and good management this journey might have been made within from twenty-four to twenty-eight hours. Instead thereof, fifty-five hours were consumed on the journey. When the horses reached their destination they were in a weakened and enfeebled condition, one died almost immediately and four others died within two weeks, the evidence showing that three of them developed pneumonia within a day or two after they were unloaded.

The shipping contract releases the express company from all liability for delay or injuries to the said animals unless such delay be caused by the express company or by the negligence of its agents or employees. Under the instructions of the trial justice a jury has found that there was a negligent delay in the transportation of the horses for which the defendant is responsible and that such delay caused the sickness and death of the five horses.

The horses left Circleville at six-forty o'clock in the evening

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of April twenty-eighth, in time to connect at Trinway, O., with train No. 34, due in Jersey City at two-fifty-two o'clock in the afternoon of the following day. They reached Trinway in time to make such connection but for some reason the conductor of train No. 34 refused to attach the car in question to his train. The plaintiff testified that the agent of the defendant who made the shipping contract at Circleville promised that the horses would go on train 34. If for any reason the agent could not make such an arrangement he should not have started the horses on their journey until later, but his testimony shows that he made no effort to make such an arrangement. The horses were consequently delayed at Trinway four or five hours while waiting for another train and were subsequently delayed at Pittsburgh and Philadelphia, so that they did not arrive at Jersey City until about two o'clock in the morning of Sunday, April thirtieth. There was a delay of about seven hours at Pittsburgh, due to a broken pedestal on the car on which the horses were traveling. This car was provided by the express company. It had been arranged before leaving Circleville by the defendant's agent that a float would be in readiness to transport the horses across the river from Jersey City to New York so that they could continue their journey up the river to Linlithgo. The plaintiff accompanied the horses in person and on arriving in Jersey City early Sunday morning found that no preparations had been completed for transporting the horses across the river. He went to the New York office of the defendant's company as soon as it opened, and was there informed that the horses would cross the river at nine o'clock. He then proceeded to Linlithgo and procured assistance to unload the horses on their arrival and waited at the station from six o'clock in the evening of April thirtieth, until midnight, when he went home, returning again at six o'clock in the morning of May first. In the meantime the horses had arrived at about two o'clock. They had been detained at Jersey City and New York about thirteen hours and the journey from New York to Linlithgo, due to a hot box in the car on which the horses were traveling, had taken about eleven hours when it might easily have been made in four or five hours. The car provided by the express company at Circleville was in

such condition that it could not continue the journey from Jersey City and the horses were transferred at that place to the other car which developed the hot box and still further delayed the transportation. There is no evidence that the company used any care, by inspection or otherwise, in the selection of either car with a view to ascertaining that its condition was such that it would not delay the journey. From the foregoing synopsis of the evidence it is apparent that the finding of the jury that the unusual delay was due to the negligence of the defendant rests on a sufficient foundation.

The plaintiff agreed to care for, feed and water the animals during transportation. Pursuant to the provisions of chapter 3594 of the act of Congress of June 29, 1906 (34 U. S. Stat. at Large, 607), the plaintiff also requested that the period of confinement of the animals without unloading be extended from twenty-eight to thirty-six consecutive hours. This was not an agreement that the express company might consume thirty-six hours in the journey but was merely a compliance with the Federal requirement that if for any reason there was a delay, the animals might be confined without unloading for thirty-six hours. Otherwise, it would have been the duty of the express company to unload and feed them after twenty-eight hours. It is true that the plaintiff did not himself furnish the horses any food or drink, but he did not anticipate nor was he bound to anticipate the unusual delay at Jersey City, and the unusual delay in transporting the horses from New York to Linlithgo. The express company caused the horses to be unloaded, fed and watered at Jersey City, and five hours of the delay at that place is excused because of that fact. This action of the company in unloading, feeding and watering the horses was perhaps in deference to the Federal requirement, the thirty-six hours of confinement of the animals having expired, and perhaps was due in part to the fact that the defective car in which they were traveling made it necessary to transfer them to another car. The question, however, of the plaintiff's contributory negligence was carefully and fully submitted to the jury by the trial justice, and they have found no negligence on his part and no question as to his contributory negligence is raised on this appeal.

Did the delay in transportation cause the sickness and

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death of the horses? One of the defendant's witnesses, who fed and watered the horses at Jersey City, gave definite testimony that the horses were then in apparently good condition. If so, they must have been in equally good condition when they left Circleville. It must be remembered that the horses might have been delivered at Linlithgo before they reached Jersey City, and if they were in good condition at Jersey City, as the witness of the defendant stated, they would have been in equally good condition at Linlithgo if they had been delivered there earlier than when they in fact reached Jersey City. The evidence is ample, however, that when they were unloaded at Linlithgo they were plainly and noticeably not in good condition and the inference at once suggests itself from their good condition at Jersey City that the delay which the jury has found to have been unnecessary and unjustifiable, was responsible for their poor condition at Linlithgo. Dr. Luff, a veterinary surgeon, examined the horses a few hours after they were unloaded and had three of them in his charge until they died, as he says from pneumonia. He was called as a witness for the plaintiff and finally testified at the instance of the defendant on cross-examination that it is natural for a horse on a railroad journey to be frightened and nervous, and consequently rendered more susceptible to the germs of pneumonia which are in the animal at all times, and that when the horse is weakened and his vitality lowered, the germs become more virile and active and pneumonia is more liable to develop. This testimony was uncontradicted. It is quite apparent that the length of a railroad journey may, therefore, be an important factor in the development of this disease. The longer the journey the more susceptible to the disease does the horse become. Of course, it is possible that the horses might have had pneumonia irrespective of the length of the railroad journey. Medical science whether applied to man or beast is not exact. In the nature of things the plaintiff could not with mathematical definiteness produce evidence that his horses would not have sickened and died if their journey had been only about half as long. But the evidence and the facts raised a question for the consideration of the jury and it was within their province to draw the proper inferences, and they have

found on what seems to be sufficient evidence that the sickness of the horses was the natural and reasonable result of their procrastinated railroad journey.

The defendant relies strongly on *Haner v. Fargo* (166 App. Div. 466). There is a wide difference between the two cases. In that case the plaintiff stipulated that the defendant might have thirty-six hours to make the transportation and there was a delay of only five hours beyond the stipulated period. The horses developed a highly contagious disease which must have been communicated to them before they started on their journey, and the evidence failed to show that the comparatively slight delay of five hours was responsible for this contagious disease. In the instant case there was a delay of about twenty-five hours, exclusive of the five hours at Jersey City when the horses were being fed and watered, or in other words the journey consumed approximately double the necessary time of about twenty-five hours within which it might have been made, and the disease was such that it could naturally and reasonably result from this delayed journey.

The judgment, however, cannot be sustained for its full amount. The liability of the defendant was limited to \$100 for each horse. The jury rendered a verdict which included that amount for each one of the five horses which died, and \$80 for the services of the veterinarian paid by the plaintiff, and \$42 paid by him for other services because of the sickness of the horses, amounting in all to \$622. One horse died almost immediately after being unloaded, another was sold by the plaintiff and thereafter died. These two horses were not attended by Dr. Luff and he does not claim to know what caused their death. There is no evidence that they had pneumonia or connecting their death with the delay in their transportation. Two hundred dollars must, therefore, be deducted from the judgment.

The judgment should be modified by deducting therefrom \$200 as of the date of its entry, and as so modified the judgment and order should be affirmed, without costs.

Judgment modified by deducting therefrom \$200 as of the date of its entry, and as so modified judgment and order unanimously affirmed, without costs.

ABRAHAM ROSENBERG, Appellant, v. CHARLES SLOTCHIN and  
NELLY SLOTCHIN, Respondents.

Third Department, December 28, 1917.

**Stay — when motion not granted — other action pending — cause  
not at issue.**

It is only where a decision in one action will determine all the questions in another action, and the judgment on one trial will dispose of the controversies in both actions, that a case for a stay is presented.

Plaintiff and defendant N. S. entered into a contract for the exchange of property which provided a certain sum as liquidated damages to either for breach of the contract by the other. The defendant C. S. signed said contract, but assumed no obligation or liability thereunder. Before service of the summons and complaint in defendants' action against the plaintiff brought in the county where they resided for breach of the contract and liquidated damages, plaintiff instituted the present action, designating the county where he resides as the place of trial. Upon defendants' motion for a stay of proceedings in plaintiff's action it appeared that the defendant N. S. had not answered, and that her time to do so had not expired and that the plaintiff had not pleaded his counterclaim for liquidated damages in the defendants' action.

*Held*, that, under such circumstances, the defendants' motion for a stay should be denied.

Until both actions are fully at issue, it is impossible to say that a determination in one action will dispose of the other.

A motion to stay an action will not be granted until after the issues are complete.

APPEAL by the plaintiff, Abraham Rosenberg, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Sullivan on the 7th day of March, 1917, staying all proceedings herein until the determination of another action brought against the plaintiff by the defendants.

*Joseph I. Stahl*, for the appellant.

*Samuel Widder*, for the respondents.

COCHRANE, J.:

December 2, 1916, the defendants delivered to the sheriff of Sullivan county, where the plaintiff resided, a summons



and complaint for service on him in an action about to be instituted against him by the defendants in Kings county where they resided. Such summons and complaint were served December 11, 1916. In the meantime, and on December ninth, the plaintiff instituted the present action by the service of the summons on the defendant Charles Slotchin, designating Sullivan county as the place of trial.

There is some ground for the inference that the plaintiff evaded service of the summons in the Kings county action until he had procured service of the summons in this action, and for the purposes of this appeal it will be assumed that he is in no better position than he would be if the Kings county action had actually been first begun. But something more is required to justify an order staying proceedings in an action than that the party against whom the stay is sought stands second in the race for priority. It is only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented. (*Dolbeer v. Stout*, 139 N. Y. 486, 489; *Ogden v. Pioneer Iron Works*, 91 App. Div. 394, 396; *Consolidated Fruit Jar Company v. Wisner*, 38 id. 369, 375.)

Both actions arise out of a contract for the exchange of real estate and personal property between the plaintiff and the defendant Nelly Slotchin, wherein the parties to such contract among other things agreed upon the sum of \$500 as liquidated damages to either for the breach thereof by the other. Each party to the contract claims that the other broke the contract by refusing to perform it. The purpose of each action is to recover damages for such breach of contract. The plaintiff herein by his answer in the Kings county action denies some of the allegations of the complaint, alleges a refusal to perform the contract by the plaintiffs in that action, and alleges the pendency of this action at the time of the commencement of that action on the same cause of action alleged in the complaint therein. Of course if the issues presented by the pleadings were the same in both actions and each party was seeking in each action all the relief to which they might under any circumstances claim to be entitled, a determination in one action might dispose of the contro-

versy in the other. But such is not the present situation. As stated the contract of the plaintiff was made with Nelly Slotchin. For some reason Charles Slotchin signed the contract but he agreed in the contract to do nothing whatever and his liability, if any, must rest in part at least on something outside the contract which on its face discloses no obligation or liability which he has specifically assumed. Nelly Slotchin, who undoubtedly has a genuine interest in the litigation, has appeared in this action, but at the time the order in question was granted had interposed no answer and her time to do so had not expired so that as to her the action was not yet at issue. Until both actions are fully at issue it is impossible to say that a determination in one action will dispose of the other. A motion to stay an action will not be granted until after the issues are complete. (*Ogden v. Pioneer Iron Works*, 91 App. Div. 394; *Raymore Realty Company v. Pfotenhauer-Nesbit Company*, 139 id. 126.) Nelly Slotchin may in her answer in this action interpose the defense of fraud or deceit in procuring her to execute the contract in question or some other defense raising an issue which clearly would not be determined in the Kings county action under the pleadings as they now stand. In *Clark v. Vilas National Bank* (22 App. Div. 605) it was held by this court: "If only a portion of the questions involved in the last action will be settled in the first, a stay will not be granted."

Furthermore the plaintiff has not pleaded his counterclaim for the liquidated damages in the Kings county action nor was he obliged to do so. In *Walkup v. Mesick* (110 App. Div. 326) an effort was made to stay proceedings in another action brought by the defendant against the plaintiff, and the court said: "He [the defendant] cannot be compelled to set up his counterclaim herein. He had the right to reserve his own claims for a cross-action, the conduct of which he could control, and to confine his defense in the action brought against him to such matters as would defeat the claims there set up. (*Brown v. Gallaudet*, 80 N. Y. 413; *Ogden v. Pioneer Iron Works*, 91 App. Div. 396.) Assuming that the plaintiff should be defeated as to either of his causes of action, or any part thereof, defendant could obtain no affirmative relief. (*Kerngood v. Pond*, 84 App. Div. 227.)" (See, also, *Con-*

*solidated Fruit Jar Company v. Wisner*, 38 App. Div. 369, 376; *Ogden v. Pioneer Iron Works*, 91 id. 394, 396.) Not seeking any affirmative relief in the Kings county action, a decision in favor of this plaintiff in that action will not give him the relief to which, if successful, he would be entitled in the present action, and as clearly indicated in the cases cited he is not required to allege a counterclaim in that action.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of SAMUEL GOLDFLAM, Respondent, for Compensation under the Workmen's Compensation Law, v. KAZEMIER & UHL, INC., Employer, and UNITED STATES CASUALTY COMPANY, Insurance Carrier, Appellants.

Third Department, December 28, 1917.

**Workmen's Compensation Law — jurisdiction of State Industrial Commission to make award for medical services paid by employee — request to employer to furnish medical services prerequisite to validity of claim by employee therefor.**

The State Industrial Commission has jurisdiction under the Workmen's Compensation Law to make an award to an injured employee for a payment by him for medical services rendered to him within sixty days after an injury sustained in the service of his employer.

It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer.

Under section 13 of the Workmen's Compensation Law, a request to the employer to furnish medical services is a prerequisite to the validity of a claim by the employee therefor.

APPEAL by the defendants, Kazemier & Uhl, Inc., and another, from an award of the State Industrial Commission,

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entered in the office of said Commission on the 1st day of November, 1917.

*William H. Hotchkiss*, for the appellants.

*Merton E. Lewis*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

COCHRANE, J.:

This appeal involves the question of the jurisdiction of the State Industrial Commission, under the Workmen's Compensation Law, to make an award to an injured employee for medical services paid by him and rendered to him within sixty days after an injury sustained in the service of his employer. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 13.)

We think such jurisdiction exists. It was so held in *Semen v. Butterick Publishing Company* (101 Misc. Rep. 285), the reasoning in which case we approve. A repetition of the reasons there stated would be superfluous. In addition to the authorities cited in the opinion in that case, attention may be called to the cases of *Shanahan v. Monarch Engineering Company* (219 N. Y. 469), and *Matter of Skoczlois v. Vinocour* (221 id. 276), which by implication seem to support this claim of jurisdiction.

But the award in this instance has been improperly made because the claimant did not request the employer to furnish medical services. Section 13 expressly makes such request a prerequisite to the validity of a claim by the employee against his employer. It is not contended that the circumstances were such that the employee could not make the request and the plain provision of the statute stands, therefore, as a bar to the claim. It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer.

The award should be reversed and the claim dismissed.

All concurred.

Award reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of MARY GIBBONS, Widow, Respondent, for Compensation to Herself and Children under the Workmen's Compensation Law for the Death of JOHN GIBBONS, v. MARX & RAWOLLE, INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, December 28, 1917.

**Workmen's Compensation Law — death of employee from heart trouble resulting from lifting of heavy weight — evidence favoring presumption of validity of claim — notice of injury — excuse for failure to serve notice — time of service.**

The Industrial Commission is justified in finding that claimant's husband while lifting a heavy weight in the course of his employment, suffered a strain which caused a dilatation of the heart muscle, resulting in his death, where a fellow-workman testified in effect that the deceased after lifting the heavy weight stopped work and said that he "had a pain," and on the following day a physician diagnosed his trouble as heart difficulty, and his wife testified that he never complained of illness before, for the evidence favors the presumption of the validity of the claim created by section 21 of the Workmen's Compensation Law.

The fact that a factory superintendent heard of an accident within ten days is insufficient to excuse the failure of the employee to serve the written notice of injury required by section 18 of the Workmen's Compensation Law.

The statute requires the notice of injury to be given within ten days after "disability," not within ten days after the injury.

Where it appears that an employee continued regularly in the discharge of his duties until the date of his disability and died within ten days thereafter, and that within thirty days after his death notice of the injury was given, the statute is complied with.

APPEAL by the defendants, Marx & Rawolle, Inc., and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 16th day of July, 1917.

*James B. Henney* [*William H. Foster* of counsel], for the appellants.

*Merton E. Lewis*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

COCHRANE, J.:

The finding of the Commission is that Gibbons, the husband of the claimant, while lifting a heavy weight in the course of his employment on March 21, 1917, "suffered a strain which caused a dilatation of the heart muscle, and resulted in acute cardiac dilatation which caused his death on April 1, 1917." It is urged by the appellants that there is no evidence that he received an injury or strain. A fellow-workman of Gibbons testified in effect that after lifting the heavy weight he stopped lifting others and asked that someone be substituted in his place to do the rest of the lifting, and that he walked up and down the platform where he was at work as if in pain. The witness asked him: "What's the matter?" and he said he "had a pain." On the following day he went to a physician who diagnosed his trouble as heart difficulty and prescribed for him accordingly until he died. His wife testified that he never complained of illness before. There is no substantial evidence to overcome the presumption created by section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). All the evidence favors the presumption. The claim, therefore, is established. (*Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435; *Fleming v. Gair Co.*, 176 App. Div. 23.)

Notice of injury was not given to the employer within ten days thereafter and the Commission has excused such failure and found that the appellants were not prejudiced thereby because the factory superintendent heard of the accident within ten days. Within our recent decisions this finding cannot be sustained. (*Dorb v. Stearns & Co.*, 180 App. Div. 138; *Walsh v. Woolworth Co.*, Id. 120; *Swart v. Town of Shelby*, 181 id. 915.) The excuse on the ground stated makes oral notice equivalent to the written notice which the statute requires. (§ 18; *Dorb v. Stearns & Co.*, *supra.*) But the statute does not require that the notice shall be given within ten days after the injury but within ten days after *disability*. The statute clearly indicates a distinction between the two words (§ 18). The language is as follows: "Notice of an injury \* \* \* shall be given \* \* \* within ten days after disability." The evidence shows that Gibbons continued regularly in the discharge of his duties

until March twenty-fifth; that then was the date of his disability and he died within ten days thereafter. Within thirty days after his death, notice of the injury was given and the statute was satisfied.

Award unanimously affirmed.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of LA MONT PRENTICE, Respondent, for Compensation under the Workmen's Compensation Law, v. NEW YORK STATE RAILWAYS, Employer and Self-Insurer, Appellant.

Third Department, December 28, 1917.

**Workmen's Compensation Law — method of determining average annual earnings and average weekly wages where claimant has worked seven days a week during year before accident — Workmen's Compensation Law, section 14, construed.**

In subdivisions 1 and 2 of section 14 of the Workmen's Compensation Law, providing that in cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary, the number 300 was selected because it bears an approximately close relation to the number of working days in the year, Sundays and holidays excluded.

But where an employee has worked seven days a week for substantially the entire year, the method of determining his average earnings indicated in either subdivision 1 or 2 would be an injustice to him, and his claim falls within subdivision 3 which provides for a case where "either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied."

Where the Commission has ascertained that in a case where an employee has worked seven days a week for the entire year, the use of the number 332 instead of 300 effects a fair and reasonable result, the method used is protected by the statute.

APPEAL by the defendant, New York State Railways, from an award of the State Industrial Commission, entered in the office of said Commission on the 15th day of November, 1915.

*Kernan & Kernan* [Warnick J. Kernan of counsel], for the appellant.

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Third Department, December, 1917.

*Merton E. Lewis*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondent State Industrial Commission.

*Lynch, Willis & Titus* [*Emerson M. Willis* of counsel], for the claimant, respondent.

COCHRANE, J.:

This appeal involves the proper application of section 14 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), in a case where the claimant has worked seven days a week for practically an entire year before the accident. The section provides methods for determining the average annual earnings and the average weekly wages as a basis upon which to compute the compensation. Subdivisions 1 and 2 of the section provide that in cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary. The number 300 used in those subdivisions is not an arbitrary selection but was evidently selected because it bears an approximately close relation to the number of working days in a year, Sundays and holidays excluded. Manifestly, where an employee works seven days a week for substantially an entire year, the method of determining his average annual earnings indicated in either subdivision 1 or 2 would be an injustice to him, just as much as it would be an injustice to the employer to apply those subdivisions to a case where the injured employee has worked less than six days a week for a substantial period of time. The claim here falls more appropriately within subdivision 3 of the section which provides for a case where "either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied." The Commission properly determined that this claim falls within subdivision 3. The remaining question is, was a correct method used in applying that subdivision.

The Commission made use of the multiplier 332 instead of 300 as fixed by the first two subdivisions and multiplied the daily wage of the claimant, which was three dollars, by 332 to ascertain his annual earnings, and divided the product



by 52 to ascertain his average weekly wages as provided by subdivision 4 of the section. It appears that the Commission has adopted a rule to use the number 332 in the case of claimants working seven days a week. That number could not properly be arbitrarily selected. But it will be presumed that by examination, observation and investigation the Commission has ascertained, as required by subdivision 3, that "having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality," the number 332 used as it was here accomplishes a result which in the case of claimants working seven days a week "shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident." Subdivision 3 does not concern alone seven-day workers but includes all cases not included in subdivisions 1 and 2, and if with due regard to the requirements of subdivision 3, the Commission has ascertained that the method adopted in this case works out a fair and reasonable result, such method is protected by the statute. Certainly, on the face of it the number 332 is no more favorable to a claimant working seven days a week than the number 300 is to a claimant working six days a week. Furthermore, the exact earnings of the present claimant for the year preceding the accident amounted to \$986, which is approximately the amount ascertained by the Commission by multiplying his daily wage of \$3 by 332. The appellant does not seem to have, therefore, a substantial grievance.

The award should be affirmed.

Award unanimously affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE PENNSYLVANIA GAS COMPANY, Relator, v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Defendant.

Third Department, December 28, 1917.

**Certiorari — order of Public Service Commission overruling demurrer to complaint not reviewable by certiorari.**

An order of the Public Service Commission, overruling a demurrer to a complaint having as its object the reduction in the price of natural gas, is in no sense a "determination," within the meaning of section 2122 of the Code of Civil Procedure, which prohibits a writ of certiorari "to review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed."

Such order does not finally determine the rights of the parties nor constitute an order in the sense that it may be reviewed by certiorari.

CERTIORARI issued out of the Supreme Court and attested on the 1st day of October, 1917, directed to the Public Service Commission of the State of New York, Second District, and Seymour Van Santvoord and others, Commissioners, composing the Public Service Commission of the State of New York, Second District, commanding them to certify and return to the office of the clerk of the county of Albany all and singular their proceedings had in overruling relator's demurrer to the petition herein.

*Fisher & Fisher* [M. H. Fisher of counsel], for the relator.

*Ledyard P. Hale*, for the Public Service Commission, Second District.

*Cheston A. Price and Thrasher & Clapp* [Louis L. Thrasher of counsel], for the city of Jamestown and others.

COCHRANE, J.:

Numerous citizens of Jamestown presented to the Public Service Commission a complaint having for its object the reduction in the price of natural gas supplied within said city by the relator. The Commission ordered the relator to make satisfaction of the matters alleged in the complaint or to make answer to the same. The relator demurred to the

complaint on the ground that the Commission was without jurisdiction. The Commission made an order overruling the demurrer and giving leave to the relator to serve an answer. This order the relator seeks to review by certiorari.

Section 2122 of the Code of Civil Procedure prohibits a writ of certiorari "to review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed." There is no statutory provision for a demurrer before the Commission. Section 20 of the Public Service Commissions Law (Consol. Laws, chap. 48; Laws of 1910, chap. 480) directs that "all hearings before a Commission or a Commissioner shall be governed by rules to be adopted and prescribed by the Commission." Presumably, the Commission has adopted a rule permitting a demurrer to a complaint or petition, but such rule is merely for the purpose of regulating the proceeding before the Commission and for the more orderly and methodical conduct of the hearing pending before the Commission. A demurrer authorized by such rule is a proper and desirable expedient for use before the Commission but it does not reach out beyond the Commission and derive any statutory or judicial recognition. The order overruling the demurrer is in no sense a determination as that word is used in section 2122 of the Code of Civil Procedure. It does not finally determine the rights of the parties nor constitute an order in the sense that it may be reviewed by certiorari. It is merely a ruling made during the course of a hearing before the Commission. As well might the relator seek to review a ruling of the Commission in respect to evidence offered during the hearing. (See *Reade v. Halpin*, 180 App. Div. 157.) While the rules of the Commission seem to provide for a demurrer, the same question might be raised by motion or in any other appropriate manner during the pendency of the hearing before the Commission. Its ruling in respect to this question stands on no different basis from its ruling in respect to other questions which arise at the hearing. Until the Commission makes a determination which finally determines the rights of the parties the relator has not sustained any grievance. The order in question overruling its demurrer does not injure or aggrieve the relator until it

is followed by some other determination or ruling affecting the price which it seeks to charge for its product, and such a determination may never be made.

The writ should be dismissed, with ten dollars costs and disbursements.

All concurred.

Writ dismissed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. UNITED VERDE COPPER COMPANY, Appellant, v. FRANCIS M. HUGO, Secretary of State of the State of New York, Respondent.

Third Department, December 28, 1917.

**Corporations — application by foreign corporation to do business within this State — refusal of said corporation to change its name so as to distinguish it as a corporation — when corporation not reorganized successor of another so as to be entitled to use its name.**

Where the name of a foreign corporation does not "clearly indicate" that it is a corporation and it is unwilling to use "in this State such an affix or prefix" as will indicate the necessary distinction, the Secretary of State may deny its application under section 15 of the General Corporation Law for a certificate authorizing it to do business within this State. Said corporation is not the reorganized successor of another foreign corporation of the same name, so as to entitle it to the benefit of the provisions of section 6 of the General Corporation Law, where it has in no sense succeeded to the franchises of the other corporation and has not supplanted or taken the place of the old corporation.

APPEAL by the relator, United Verde Copper Company, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 18th day of June, 1917, denying its motion for a peremptory writ of mandamus.

Prior to the year 1900 there was incorporated in the State of West Virginia a corporation under the name of United Verde Copper Company. This corporation was authorized and is still authorized to do business in this State. The

relator has been incorporated under the laws of the State of Delaware, having the same name as the West Virginia corporation, and has applied under section 15 of the General Corporation Law (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], as amd. by Laws of 1917, chap. 594) to the Secretary of State for a certificate authorizing it to do business within this State. This certificate the Secretary of State declines to issue, and the purpose of this proceeding is to require him to deliver such certificate.

*Atwater & Cruikshank* [Edward L. Blackman of counsel], for the appellant.

*Merton E. Lewis, Attorney-General* [Wilber W. Chambers, Deputy Attorney-General, and Frank S. Sharp of counsel], for the respondent.

COCHRANE, J.:

Section 6 of the General Corporation Law (as amd. by Laws of 1917, chap. 594) provides that no corporation except a religious, charitable or benevolent corporation shall "be authorized to do business in this State unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership; or unless such corporation uses with its corporate name, in this State, such an affix or prefix." The name of the relator does not "clearly indicate" that it is a corporation and it is unwilling to use "in this State, such an affix or prefix" as will indicate the necessary distinction. The Secretary of State, therefore, was right in withholding his certificate under section 15 (as amd. *supra*).

The relator contends that it is the reorganized successor of the West Virginia corporation and is, therefore, entitled to the benefit of a subsequent provision in section 6 which reads as follows: "A corporation formed by the reincorporation, reorganization or consolidation of other corporations or upon the sale of the property or franchises of a corporation, or a corporation acquiring or becoming possessed of all the estate, property, rights, privileges and franchises of any other corporation or corporations by merger, may have the same name

as the corporation or one of the corporations to whose franchises it has succeeded." Obviously this provision of the statute does not help the relator. It merely provides that a corporation under some circumstances "may have the same name as the corporation or one of the corporations to whose franchises it has succeeded." The words "may have the same name" in the connection in which they are used imply the power to give a name, an idea which is quite inapplicable to a corporation formed in another jurisdiction and in respect to which the Legislature of this State is powerless to indicate whether it should "have the same name" or a different name. This Delaware corporation has been given its name by the State of Delaware. This State has nothing to do with its name. It neither gives nor denies to the relator its name. In the previous part of the section on which the Secretary of State relies a clear distinction is made between the name which a corporation *has* and the name which it may *use*. If it does not have in its name words indicating its corporate capacity it may *use* such words with its corporate name and thereby become entitled to do business in this State. The State of New York merely says that this Delaware corporation may use within this State the name which has already been given to it by its own State, but it must also use in connection with that name something to indicate that it is a corporation.

Furthermore the meaning of that statute is that the newly-formed corporation shall supplant or take the place of the old corporation. When one comes into existence the other goes out of existence. The words "to whose franchises it has succeeded" clearly imply that both cannot co-exist. It is true that the Delaware corporation has the same officers and directors as the West Virginia corporation. The stockholders of the latter voted to reorganize in Delaware and the Delaware corporation has taken over the property of the West Virginia corporation but it has given the latter an equivalent for its property. All the stock of the Delaware corporation is held by the West Virginia corporation. An officer of the latter states in his affidavit as follows: "The stockholders of the said United Verde Copper Company of West Virginia have voted for the dissolution of that company, but such

dissolution has not yet been carried out, and it is desired to have the new Delaware Company engage in business and continue its operation without awaiting the dissolution of this company." There is no assurance that such dissolution ever will be effected. The situation is that there are two corporations having the same name, one owing allegiance to the State of West Virginia, and the other to the State of Delaware. One corporation derives its franchise from one State and the other corporation derives its franchise from another State. Both franchises are still in existence and both may continue to exist indefinitely. The franchise of neither corporation is controlled by the jurisdiction which granted the franchise to the other. The Delaware corporation has in no sense succeeded to the franchises of the West Virginia corporation and is not, therefore, within the purview of the statute which it invokes.

The order should be affirmed, with costs.

All concurred; KELLOGG, P. J., in result, in memorandum.

KELLOGG, P. J. (concurring in result):

The provision that the corporate name itself, or a prefix or suffix to it, shall indicate the existence of a corporation, was first brought into the law by the amendment of 1911. Before that time section 6 provided: (1) That no corporation should be formed, or authorized to do business in the State, which had the same name as another corporation; (2) that a corporation formed by reincorporation or merger may bear the same name as the corporation to which it succeeded. This last provision was in fact an exception to the first. The amendment with reference to requiring the name to indicate the corporate character was evidently inserted by mistake, by chapter 638 of the Laws of 1911, between these two provisions, that is, between the provision and the exception, when in fact it should have been inserted after the second provision.

The statute, properly construed, requires, I think, that a corporation formed or permitted to do business shall not have the name of another corporation unless the latter corporation is a merger, or in some way is the successor of

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the former, and, as an independent proposition, that the corporate name must indicate, in itself or otherwise, the corporate character. Therefore, without regard to whether the new corporation is a merger or reorganization or otherwise, it cannot be permitted to do business in this State without complying with the added provision of the section. Its name, or a prefix or suffix, must indicate the corporate character.

Order unanimously affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
WILLIAM C. HAGER, Appellant.

Second Department, December 29, 1917.

**Crime — violation of Penal Law, section 1142, in representing that drug or medicine can be used to procure abortion — evidence.**

Upon the prosecution of a defendant, a physician, for the violation of section 1142 of the Penal Law, the witnesses for the People were detectives, members of the police force who acted as decoys. It appeared that the defendant gave a prescription to one of the witnesses and furnished her some pills, but the prescription was nothing more than a formula for nausea, and there was no proof that the pills in the dose recommended would be an abortifacient or that they purported to be "for causing unlawful abortion." Evidence examined, and *held*, insufficient to convict the defendant of selling or giving away a drug or medicine for causing unlawful abortion or purporting to be for causing unlawful abortion, but sufficient to justify a finding of his guilt in holding out representations that the drug or medicine "can be so used or applied, or any such description as will be calculated to lead another to so use or apply," etc.

The gravamen of the provision of the statute prohibiting the holding out of representation that a drug or medicine can be used to procure an abortion is not the character of the drug nor the purpose of him who proffers it, but the representation made.

BLACKMAR and STAPLETON, JJ., dissented, with opinion.

APPEAL by the defendant, William C. Hager, from a judgment of the Court of Special Sessions of the City of New York, county of Kings, rendered against him on the 4th day of



August, 1916, convicting him of the crime of selling a drug in violation of section 1142 of the Penal Law.

*Frederick N. Van Zandt*, for the appellant.

*Harry G. Anderson*, Assistant District Attorney [*Harry E. Lewis*, District Attorney, with him on the brief], for the respondent.

JENKS, P. J.:

The defendant, a physician, was convicted of a violation of section 1142 of the Penal Law. Even with disregard of the defendant's proof so far as it is contradictory or contrary to the proof of the People, I think that he could not have been convicted of selling or giving away a drug and medicine for causing unlawful abortion or purporting to be for causing unlawful abortion. He gave a prescription and furnished certain pills. The prescription appears to be nothing more than a formula for nausea. Chemical analysis of the pills detected but one substance in a quantity sufficient for identification, namely, an unstated quantity of aloin, which is an active cathartic, a purgative glucosid, made from aloes. (Cent. Dict.; Dorland's Am. Illus. Dict. of Medicine [8th ed.]) There is no proof that the pills in the dose recommended would be an abortifacient for the woman in the condition represented by her. There is no proof that the pills purported to be "for causing unlawful abortion," a phrase that means they imported to be for that purpose, as, *e. g.*, by inscription upon the box or bottle that contained them.

But this statute also prohibits holding out representations that the drug or medicine "can be so used or applied, or any such description as will be calculated to lead another to so use or apply," etc. The information, which is to be regarded as an indictment, specifies such doings by the defendant, and was, therefore, sufficient to sustain a conviction upon this part of the said statute. (*Bork v. People*, 91 N. Y. 5; *People v. Corbalis*, 86 App. Div. 531.)

The two witnesses for the People were detectives who were decoys. But they were not within the category of private detectives, but were members of the police force assigned to a special squad, and acted presumably in dis-

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charge of prescribed official duties. There is no dispute that the defendant, after he had been told by one of them that the other, who posed as her sister, supposed that she was pregnant, made an appointment for the latter at his office. There is no dispute that the two women thereafter came to his office, that one of them represented that the absence of her menses caused her to suppose that she was pregnant, that the defendant thereupon took her into his private office apart from her companion, consulted with her upon her supposed condition and thereafter in the presence of both women wrote the said prescription and furnished the said pills. There is, however, this variance: the two detectives testify that he was asked in effect how long before the menses would be brought on, and he replied, in two or three days, but he insists that this statement was not made, and that his purpose was to secure a relaxation of the bowels preliminary to a proposed examination. Both they and he agree that he told the supposed pregnant woman to return to his office later. If the detectives are to be credited, the defendant consulted as to a supposed pregnancy indicated by cessation of menses, furnished a drug to the woman with the statement that the drug would bring on the menses. There is plain indication that the pills were of a well-recognized kind, described by a name, containing no prohibited drug, purchasable at any chemist's shop without prescription, and used as a mild cathartic. But the gravamen of this provision of the statute is not the character of the drug, or the purpose of him who proffers it, but the representation made. Was the proof sufficient to justify a finding that the defendant held out to the detective that the pills taken in the dose prescribed would restore her menses, after she had represented to him that they had ceased under such conditions as indicated a possible pregnancy? The trial court has determined against the defendant, and I cannot say that the proof did not warrant its conclusion. The court evidently thought that the offense was not flagrant, inasmuch as it imposed the punishment of a fine.

I advise that the judgment be affirmed.

RICH and PUTNAM, JJ., concurred; BLACKMAR, J., read for reversal, with whom STAPLETON, J., concurred.

BLACKMAR, J. (dissenting):

I dissent. The medicine which the doctor gave was entirely harmless; and it is proposed to uphold the conviction on the ground that he represented that it would produce an abortion. There is no direct evidence of any such representation; it is spelled out of the evidence of the complaint of the woman and the prescription of the physician. Both witnesses for the People were police detectives, engaged in an attempt to decoy the defendant into the commission of a crime — an immoral act in itself, and carried out by falsehood. In some respects their evidence was highly improbable, as where one testified that she heard the conversation through the closed door of the examination room although she did not listen at the door. It is suggested that she might have fabricated a situation which would make her evidence more believable, if she had testified that she did listen at the door; but we must recognize a natural aversion to confess to eavesdropping. Every circumstance tended strongly to show the innocence of the defendant; the fee was two dollars, usual for innocent consultation, although the witnesses testified that she suggested ten dollars and the doctor asked twenty-five; the medicine itself was harmless, and the reputation of the defendant was of the best.

Detective work in obtaining by legal methods evidence of crime is necessary, and the vocation should be held in proper esteem. But it is neither necessary nor honorable to induce the commission of a crime, whether the procurer is paid by the public or by private parties. In both cases the witnesses are under a temptation to make good. In the case of private detectives, the courts consistently refuse to grant divorces without corroborating evidence. The courts established the rule that convictions by accomplices could not be had without other evidence tending to connect the defendant with the commission of the crime, long before it was enacted into a statute. (See Code Crim. Proc. § 399.) It is the duty of the courts, in reviewing a conviction, not only to determine whether there is some evidence, but whether it is enough to exclude reasonable doubt. In this case, the evidence is, in my opinion, not sufficient. A conviction of a professional man of unimpeached character should not be had solely on

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the testimony of paid detectives who claim to have induced the commission of the crime, when that testimony has elements of improbability and is not supported by a single fact or circumstance which lends it even an air of probability. Every doctor in the community, no matter how innocent in fact or how high his character, is at the mercy of such an attempt.

STAPLETON, J., concurred.

Judgment of conviction of the Court of Special Sessions affirmed.

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MARY MARSHALL, as Administratrix, etc., of WILLIS C. MARSHALL, Deceased, Respondent, v. THE SACKETT & WILHELMS COMPANY, Appellant.

Second Department, December 29, 1917.

**Master and servant — duty of loyalty — action for wrongful discharge — duty of servant to disclose secret agreement with former employer.**

The obligation of loyalty, implied in the relation of master and servant, rests upon the rule that he who undertakes to act for another shall not in the same matter act for himself.

Where, in an action for an unlawful discharge, it appeared that the plaintiff's decedent, being an officer and active in the business of a corporation controlled by another company, agreed with it to effect a sale to the defendant of his own corporation, upon a commission based upon an inventory, and two days after making the sale entered into the service of the defendant but did not inform it of said agreement; and that, as the purchase price was to be determined by an inventory which was open to correction, the interests of the parties were adverse, it was error for the court to charge, as a matter of law, that the plaintiff's decedent was not obliged to tell the defendants that he was to receive compensation from his old employers and to refuse to charge that on the issues of loyalty to the defendant it was not necessary for the jury to find there was any actual disloyalty or dishonesty.

It was a question for the jury whether the plaintiff's decedent fulfilled his obligation of service by keeping the agreement secret.

APPEAL by the defendant, The Sackett & Wilhelms Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of

Kings on the 4th day of March, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 3d day of March, 1916, denying defendant's motion for a new trial made upon the minutes.

*Joseph J. Corn* [*Charles Kaufmann* with him on the brief], for the appellant.

*Clarence Blair Mitchell* [*Nelson Shipman* and *William R. Bayes* with him on the brief], for the respondent.

JENKS, P. J.:

Marshall, now represented by the plaintiff, was a servant who sued his master for damages for an unlawful discharge. I think that an error in an instruction to the jury is fatal to the judgment that was entered upon the verdict for the plaintiff. The master pleaded *inter alia* a breach of the obligation implied in the relation of master and servant which I may term loyalty. The obligation rests upon the rule that he who undertakes to act for another shall not in the same matter act for himself. The rule is familiar and has received frequent application. (*Gardner v. Ogden*, 22 N. Y. 327, 347 *et seq.*, citing *Aberdeen Railway Co. v. Blaikie Brothers*, 1 Macq. 461; *Reis & Co. v. Volck*, 151 App. Div. 613; *Dutton v. Willner*, 52 N. Y. 318; *Labatt Mast. & Serv.* [2d ed.] §§ 284, 285, citing *Pearce v. Foster*, L. R. 17 Q. B. Div. 536; *Swale v. Ipswich Tannery*, 11 Com. Cas. 88; *Wood Mast. & Serv.* [2d ed.] § 115; 20 Halsbury's Laws of England, 101.)

In November, 1911, Marshall was a stockholder, an officer, and was active in the business of the corporation, the Souvenir Post Card Company, which was controlled by the Isaac H. Blanchard Company. There had been and then was under consideration a sale of stock and part of the assets of the post card company to the defendant, and Marshall took part in the negotiations. On November 20, 1911, the Blanchard corporation executed an agreement with Marshall. Therein the president of the Blanchard corporation stated that he had made up an estimate as of September 1st inventory of an irreducible minimum which must be received, amounting to \$86,000, to which amount should be added one-half of the estimated profit on unfilled orders, or whatever amount was received for that item; and whereby it was agreed that if

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Marshall succeeded in "affecting" (effecting?) a sale or sales at or in excess of the minimum provided for, "we are to pay you the following commission: \$500.00 plus 25% of the overage in excess of the minimum specified herein. This commission is payable when, and only when, collected by us. In the case of partial payments we should apportion them between us, viz.:

Total sale.....	\$100,000
Minimum, say.....	87,000
<hr/>	
Overage.....	\$13,000
<hr/>	
Your share, 25%.....	\$3,250
Plus.....	500
<hr/>	
Your total interest.....	\$3,750 "
<hr/>	

On December 30, 1911, an agreement was made between the Blanchard corporation as "vendor," the defendant as "purchaser," and the Souvenir Post Card Company, for a sale of the capital stock and of certain assets of the said company. The agreement for sale is long and specific. It provides for payment on account of part performance and then that the other payments shall be made as provided for. By the article following such provision, the company is to prepare a complete set of inventories and schedules as provided for in the agreement, on or before January 25, 1912, and as soon as completed to notify the purchaser, who shall arrange to complete performance as to taking possession and paying for the same within twenty-four hours after, and shall pay two-thirds of the price ascertained. *"The balance to be payable within two weeks therefrom, provided the inventories and schedules have been found to be correct by the Purchaser, or if incorrect, such corrected balance to be so payable."* (The italics are mine.) The sale was made, and thereafter, and on January 27, 1912, Marshall, as had been contemplated, entered into the service of the defendant and continued therein for some months, when he was discharged. Marshall admitted that he never informed the defendant of his said agreement with the

Blanchard corporation. There is no proof that would have justified him in the belief that the defendant had knowledge thereof.

The learned court, referring to Marshall and the defendant, instructed the jury under exception: "There is the single charge that he kept secret from them that he was to get compensation from his old employers. I charge you as a matter of law he was not obliged to tell them that. But he was obliged to do his best." It is to be noted that the court did not tell the jury that "Marshall was not obliged to tell them that" as matter of law, with the intention to leave the question of loyalty to the jury, but that the law absolved the servant from a disclosure of this agreement. We may infer that the inventory and schedules were duly prepared and delivered on or before January 25, 1912, and, therefore, but two days before the defendant became the servant of the defendant. Under the agreement of sale, the price was dependent upon that inventory, and the one-third of the price was payable within 12 days after Marshall entered the service of the defendant. That one-third represented the balance payable "provided the inventories and schedules have been found to be correct by the Purchaser, or if incorrect, such corrected balance to be so payable."

The interests of the vendor and the purchaser as to the price, so far as undetermined, naturally were adverse. As part of the price was determined by an inventory which was open to correction, the interests of the vendor and the purchaser with respect to the inventories naturally were adverse. The defendant had the right to expect that its servant, who undertook to serve it in any matter related to the inventories, would serve the interest of his master alone. And it had the right to expect that its servant was free to do so unfettered by a possible self-interest. Yet in this case the jury could have found that self-interest of the servant could make against the master. For in the nature of things the servant was interested in keeping the inventory as prepared and delivered. He admits that he received \$500 on account of this secret agreement on the day of the sale or the day after. Naturally he would be interested that correction by the purchaser should not reduce the balance of the purchase price. He testified on the trial: "Q. Didn't you get more than the \$500? A. Not

yet. Q. You expect to? A. I do hope so. Q. Now, this agreement between you and the Blanchard Company is still in force, isn't it? A. It is. Q. And during the time you were employed by the Sackett & Wilhelms Company it was in force? A. It was." If the scope of the employment of the servant, or the duties committed to him and accepted by him, could array self-interest against the master's interest, unless the servant had reason to believe that at the outset the master knew of this secret agreement, then I think at best for the plaintiff it was a question for the jury whether the servant fulfilled his obligation of service by keeping the agreement secret. It is conceivable that a servant could have an agreement made before he entered service, which might benefit him in dealings between his master and third persons during the servant's term, which agreement or the dealings thereunder could not be affected by the fact of employment or by any word, act, omission or commission of the servant.

The learned court refused, under exception, to charge, except as already charged, that on the issues of loyalty to the defendant, it was not necessary for the jury to find there was any actual disloyalty or dishonesty. "Actual" means "real," "existent." I think that the defendant was entitled to the instruction. (See authorities *supra*.) Otherwise it might be concluded that the vice was not in the secret agreement, but only in action that resulted from it. The master at the time of his discovery of the agreement might be unable to put his finger upon tangible results, and yet would be conscious for the first time that he had intrusted work already done and past undoing to his servant, who at the time naturally could have arrayed self-interest against the interest of his master. I am not clear but that the court theretofore had charged almost, if not altogether, this proposition, so as to avoid the imputation of positive error. But it is not necessary to determine this question in the disposition of the case.

STAPLETON, MILLS, RICH and BLACKMAR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.



FRANK W. PATTERSON, Plaintiff, v. LOUIS JOHNSON, Defendant.

Second Department, December 29, 1917.

**Real property — mortgage containing no reference to restrictive covenants — purchaser on foreclosure takes free of restrictions — title marketable — when covenants are personal to grantor and do not run with land.**

Where a realty company gave a mortgage on a certain lot containing no restrictive covenants as to the use of the premises and subsequently conveyed the lot, subject to said mortgage, by a deed containing restrictive covenants as to the building to be placed thereon, a purchaser on the foreclosure of said mortgage and his successor in title holding through a referee's deed containing no reference to the restrictions, takes the premises free of the restrictions, and, hence, one who has contracted to purchase from such grantee cannot refuse performance upon the ground that it was impossible to convey an unincumbered title.

Where only a portion of the lots sold by the realty company were subject to restrictive covenants and these were some distance from the lot sold on foreclosure, and there were no covenants on the part of the grantor or mutual agreements between the several lot owners creating easements, the restrictions will be deemed personal to the grantor and are not enforceable by the owner of lots acquiring title after the deed was given.

The rights of the realty company were extinguished by the foreclosure of its mortgage.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*William W. Scrugham* [*W. Chantler Arbuckle* with him on the brief], for the plaintiff.

*Thomas M. Smith* [*Henry Martyn Baird, Jr.*, with him on the brief], for the defendant.

RICH, J.:

This is the submission of a controversy upon agreed facts under the provisions of sections 1279-1281, inclusive, of the Code of Civil Procedure, and presents the question whether or not the defendant is able to perform his contract with the plaintiff to convey to the latter real property in the city of Yonkers, free and clear of all incumbrances, with the exception of a specified mortgage, which is a lien thereon.

The plaintiff demands judgment for specific performance of the contract, or if, as he contends, that is impossible, for the money paid by him when the contract was executed, together with his expenses incurred in examining the title.

The land involved is designated as lots 1, 2 and 3, on a map filed in the office of the register of the county of Westchester, entitled "' Map of Lowerre Summit Park in the City of Yonkers, owned by the Van Cortlandt North Company,' made by M. Lorini, C. E., November 12, 1908."

The Lowerre Summit Park Realty Company acquired title to the lots involved, and also to lots 6 to 10, inclusive; 27 to 34, inclusive; the easterly half of lot 36; lots 37 to 51, inclusive; lot FF; the northerly 25 feet of lot EE of block A, and parts of blocks B, C, D, E, F and G, as shown by and appearing upon said map. Said Lowerre Summit Park Realty Company on November 15, 1912, executed a mortgage upon lots 1, 2 and 3 in Block A on said map to one La Monte, which by various assignments became the property of Dudley R. Van Ness. This mortgage contained no covenants restricting the use of the mortgaged premises or the character of the buildings which might be erected thereon. By a deed dated April 10, 1913, said company conveyed said lots 1, 2 and 3 to Theodore R. Van Ness, subject to said mortgage and subject to the following restrictions:

"a. No more than one house shall be erected on plot 37 feet front by 100 feet in depth; such house shall be for two families, not less than two stories in height, nor without cellar, nor with roof known as flat roof, and shall not cost less than \$6,000, or one house on plot 25 feet by 100 feet in depth for one family, not less than two stories in height, nor without cellar, nor with roof known as flat roof and shall not cost less than \$5,000. No other building shall be erected on said premises except a private garage.

"b. No building shall be erected thereon until its exterior plans have been approved by the said company.

"c. No intoxicating liquors shall be manufactured or sold, no stores erected or maintained, no manufacturing of any kind carried on, and no hogs, goats, geese, chickens, or ducks kept upon said premises.

"d. No fence or building shall be erected within 20 feet

of the front line, nor building within 2 feet of the side lines of said premises, nor fence over 4 feet high nor garage within 60 feet of any street line.

"This restriction shall not apply to steps, piazza or bay windows upon houses so erected.

"These restrictions shall be binding upon the land and any owners thereof until January 1st, 1930."

At the time of this conveyance, the grantor had sold thirty-one full and two one-half lots in block A, and was the owner of the remaining thirty full and two one-half lots in said block. The title to said lots 1, 2 and 3 in block A, by sundry conveyances, each stating that the premises conveyed were subject to said mortgage and said restrictions, vested in Charles W. Boote as trustee on July 2, 1914. On May 25, 1916, Dudley R. Van Ness commenced an action in the Supreme Court to foreclose the said mortgage. The Lowerre Summit Park Realty Company, said Boote as trustee, and other parties having a specific interest in or lien upon the mortgaged premises, were made defendants. The owners and mortgagees of the lots owned by said company at the time of its conveyance to Theodore R. Van Ness were not made parties. Judgment of foreclosure and sale was rendered, under which the lots were sold and conveyed on August fifteenth to "Van Ness Bros., Inc.," a domestic corporation, the referee's deed containing no reference to said restrictions. On October 2, 1916, said corporation conveyed said lots to the defendant by a full covenant and warranty deed, purporting to convey them free and clear of all incumbrances.

Prior to the filing of the notice of pendency in the foreclosure action, the Lowerre Summit Park Realty Company had sold and conveyed all the lots in said block A, the deeds to nine and one-half of said lots containing covenants and restrictions substantially the same as those contained in the deed to Theodore R. Van Ness, and the deeds of the remaining twenty and one-half lots contained no restrictions. The restricted lots are all in the extreme north end of block A-4, fronting on Park Hill avenue; one and one-half on Marshall road and four on Madeleine parkway. The restricted lot nearest defendant's lots is lot 27, which is about 750 feet distant therefrom. Between restricted lots 27 and 28, and

restricted lots 33 and 34, fronting on Park Hill avenue, are lots 29, 30, 31 and 32, unrestricted; and between restricted lot 37, fronting on Marshall road, and restricted lot 39, fronting on Madeleine parkway, is lot No. 38, unrestricted. Lot 51, fronting on Lewis parkway, and abutting on the rear defendant's lot 3; lots 6, 7, 8, 9 and 10, which are the fifth, sixth, seventh, eighth and ninth lots north of defendant's lot and nine and one-half lots fronting on Lattin drive — much nearer defendant's premises than the nearest restricted lot — are all without restriction.

The plaintiff contends that the restrictive covenants contained in the deed to Theodore R. Van Ness were imposed for the benefit of all the lots in block A, owned by the corporation grantor at the time such deed was given, and enforceable by the owner of such lots at any time thereafter. That the rights were not extinguished by the foreclosure judgment, because the owners of the lots were not made parties to the action, is the basis for the argument that the title tendered by the defendant was not free and clear from all incumbrances. He contends that the defendant cannot perform his contract of sale, and that he should have judgment for the moneys advanced by him on the execution of the contract, together with his expenses for examining the title. I think that this contention is without merit. The restrictions contained in the Van Ness deed are clearly personal and not enforceable by the owner of any of the lots acquiring title after the deed was given. There is no corresponding covenant by the grantor; there is no mutual agreement or undertaking between the several lot owners creating an easement, and nothing disclosed from which mutual rights are fairly inferable. Of all the lots conveyed by the Lowerre Summit Park Realty Company (located in block A) after the conveyance to Van Ness, the deeds to but nine full and one half lot contain restrictions, and they are a long distance from defendant's lots, while the lots in the vicinity of defendant's are unrestricted. This, I think, repels any presumption of a general scheme created for the benefit of all the lots. No uniform restrictions or uniform plan of improvement are shown, and no lot owner is in a position to raise a question based on a breach of covenant by defendant

or his predecessors in title, the rights of the corporation having been extinguished by the judgment in the foreclosure action. (*Clark v. Devoe*, 124 N. Y. 120, 124; *Equitable Life Assurance Society v. Brennan*, 148 id. 661; *Silberman v. Uhrlaub*, 116 App. Div. 869; *Davidson v. Dunham*, 159 id. 207, 209; *Schermerhorn v. Bedell*, 163 id. 445; *Barney v. Everard*, 32 Misc. Rep. 648; *Schwoerer v. Leo*, 39 id. 505; *Dime Savings Bank v. Butler*, 96 id. 82.)

The authorities cited by the plaintiff to sustain his contention are distinguishable from the case presented by this record. In those cases the covenants involved were mutual.

There is no defect in defendant's title to the premises he contracted to convey to the plaintiff that affects its marketability or constitutes a cloud thereon, and the defendant is entitled to judgment in accordance with the 21st subdivision of the stipulation, without costs.

JENKS, P. J., STAPLETON, PUTNAM and BLACKMAR, JJ., concurred.

Judgment for defendant, without costs, in accordance with the stipulation.

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DAVID SMITH, an Infant, by WILLIAM D. TUCKER, His Guardian ad Litem, Respondent, v. HATTIE C. SMITH, Individually and as Trustee under the Last Will and Testament of FREEMAN A. SMITH, Deceased, and Others, Appellants.

Second Department, December 29, 1917.

**Will construed — law of State of New Jersey — when grandson of testator takes interest which will support action for waste against life tenant — form and amount of bond — costs.**

A will placed the residuary estate in trust with the direction that one-third of the income be paid to the widow and the residue in equal portions to the testator's children with power in the widow, while living, to receive and apply the share of a minor child to his maintenance and education. It was provided that in case of the widow's death before the division of the property the entire net income was to be paid in equal portions to the children for support and education until the youngest reached majority, at which time the residuary estate was to be divided into three

parts, one transferred to the widow in trust for herself and children for life, the remaining two-thirds to be transferred to the children equally, the issue of any deceased child to take the parent's share *per stirpes*. It was then provided that in case the widow died before the time for division, the trustee should then divide the whole estate equally among the children, the issue of deceased children to take their parent's share *per stirpes*. It was further provided that if the widow survived the first division, upon her subsequent death, the part of the residue estate held in trust for her should go to the children equally, the issue of a deceased child to take *per stirpes*.

*Held*, that under the law of the State of New Jersey by which the will is governed, a grandchild of the testator, whose father died after the first division of the estate, had such an interest therein as entitles him to maintain an action for waste against the widow who is still surviving, and this irrespective of whether his interest is indefeasible or not.

In such action for waste the trustee should not be required to give a bond to secure the payment of a fixed sum to the plaintiff, nor should it be found that a fixed sum will be due; the bond should secure the plaintiff against loss for such sums as the widow has wasted or may hereafter waste.

The costs of the action should not be paid out of the estate by sale of assets or otherwise, but should be charged to the defendants personally.

APPEAL by the defendants, Hattie C. Smith, individually and as trustee, and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 13th day of July, 1917, upon the decision of the court after a trial at the Kings County Special Term, and also from an interlocutory judgment entered in said clerk's office on the 20th day of June, 1917, and also from an order entered in said clerk's office on the 13th day of July, 1917.

*Frank W. Holmes*, for the appellant Hattie C. Smith.

*Orville C. Sanborn*, for the respondent.

THOMAS, J.:

The question is whether plaintiff may maintain an action against his grandmother, Hattie C. Smith, life tenant and trustee, under the will of Freeman A. Smith to prevent waste of the estate. The testator left Hattie C. Smith, his widow, and three children, Freeman A. Smith, Grace A. Love, defendants, and David Smith, plaintiff's father. The will

gave the remainder of the estate in trust to the executor to pay one-third of the net income to the widow and the residue in equal proportions to his children, with direction that the widow should receive the share of a child under the age of twenty-one years to be applied to maintenance and education, or in case of the widow's death before division, to pay the entire net income in equal proportions to the children for their support and education "until the youngest surviving of them shall have attained" the age of twenty-one years. "When my youngest child who shall survive to the age of twenty-one years, shall have reached" that age, the executors and trustees shall divide the residuary estate into three equal parts, "one of which parts they shall thereupon transfer \* \* \* to my said wife Hattie C. Smith in trust for her and my children," with the beneficial interest in the net income thereof in the widow for her life, and the remaining two-thirds "they shall upon such division, transfer, \* \* \* to my children share and share alike, to have and to hold to them, their heirs and assigns forever the issue of a deceased child to take the parent's share, *per stirpes* and not *per capita*." But in case the wife should die "at or before the time for the division," the executors and trustees shall then at the time fixed for such division, divide all such estate "among and convey the same to my children, share and share alike, to have and to hold the same to them, their heirs and assigns forever, the issue of a deceased child to take the parent's share *per stirpes* and not *per capita*." Such was subdivision 5 of paragraph 3. The 6th subdivision provides for the final disposition of the one-third share in case the widow survives the first division, and is: "Upon the death of my said wife, after such division of my residuary estate, I give and devise the one-third part of my said residuary estate, so set apart and held in trust by and for her as aforesaid to my children, share and share alike, to have and to hold the same to them, their heirs and assigns forever, the issue of a deceased child to take the parent's share *per stirpes* and not *per capita*." The scheme of the will is to give to the widow one-third of the net income of the estate during her life, and to pay or to apply the rest of the net income to the children with a power in the mother living to receive

and to apply the share of a minor. When the youngest child surviving to the age of twenty-one years should reach that age, the whole estate should be divided if the widow were not living; if she were living, one-third of the estate should be kept and divided at her death. In case of the death of the widow before the first division, there were no words of present gift; in case of her death after such division, there are such words. The widow and plaintiff's father lived to the time of the first division, when two-thirds of the estate were divided among the children and one-third retained by the wife. The widow is still living, but the plaintiff's father has died. Did plaintiff's father, David Smith, take an indefeasible vested estate in the one-third set apart upon the first division? If so, the plaintiff has no interest and cannot maintain the action on the present record. If plaintiff has any interest it is because upon the wife's death the gift and devise of the third part is to children "share and share alike, \* \* \* the issue of a deceased child to take the parent's share." The question is to be determined by the laws of the State of New Jersey, and the task is to fit the law of that State to the will. In *Security Trust Co. v. Lovett* (78 N. J. Eq. 445) the will gave the estate to the wife for life, with a direction that after her death the proceeds from the sale of the real estate should be divided "between my children," naming them, share and share alike, one-twelfth share among named children of a deceased daughter, and provided: "should either of my above named children die leaving issue, it is my will that the portion herein devised or bequeathed to such child or children shall be equally divided between their issue." There was a gift to named persons and not to a class, and there was more propriety in referring the substitutionary clause to death before that of the ancestor, but the vice-chancellor wrote: "This provision, relating to the contingency of the death of the children, will, by the accepted rules of construction in such cases, be understood to refer to the death of the children prior to the period of distribution — that is, prior to the termination of the life estate by the decease of the widow. *Brown v. Lippincott*, 49 N. J. Eq. (4 Dick.) 44; *Fischer v. Fischer*, 75 N. J. Eq. (5 Buch.) 74." It may be said that there was no present gift as in the present



6th subdivision, but a direction to divide as in the 5th subdivision of such will. In *Miller v. Worrall* (59 N. J. Eq. 134) there was a direction to divide upon the death of the wife "between my children, share and share alike, to whom I do hereby give, devise and bequeath the same, their heirs and assigns forever, the children of any deceased child to have the share of his, her or their parent." A child died before the life tenant without leaving issue, and although the controversy was between her executors and the surviving children, it was said that "By the express provisions of the will, if a child dies before the period of distribution and leaves children, those children take, by substitution, for the parent. In this event, and in this event only, is the right of the child curtailed." In *Dilts v. Clayhaunce* (70 N. J. Eq. 10) the testator gave the residue of his estate to his wife for life, and at her death to his stepson, Ege, and provided that in case Ege should die "without lawful issue, that my property \* \* \* be equally divided between my brothers and sisters, and in the case of the decease of either or any of them their several portions shall descend to their children." The court decided that Ege took a vested estate in fee simple, subject to the contingency of his death without lawful issue. The chancellor wrote: "Giving to every word of the clause in question its full force, it may be thus paraphrased, viz.: Upon the happening of the contingency I have prescribed, my property, of all kinds, shall go to my brothers and sisters equally, and if any have died leaving children, their share shall go to their children; but if any have died leaving no children, their share shall go to their heirs-at-law or next of kin, according to the nature of the property." It is urged by plaintiff that *Lyons v. Ostrander* (167 N. Y. 135) and *Marsh v. Consumers Park Brewing Co.* (220 id. 205) are to the same effect. The learned counsel for appellant relies upon the cases in this State and in the State of New Jersey, but decisions in the latter State cited by him do not have the present substitutional clause. *Fischer v. Fischer* (75 N. J. Eq. 74) seems to support the plaintiff, as does *Brown v. Lippincott* (49 id. 44). It is concluded that the plaintiff has an interest in the fund. It is not necessary to decide whether it is an indefeasible interest. It is sufficient to enable him to maintain this action.

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But the trustee should not be required to give a bond to secure payment to the plaintiff of a fixed sum, nor should it be found that a fixed sum will be due him. The bond should be in the sum of \$26,292.85 to secure the plaintiff against loss for such sums as Hattie C. Smith has wasted, as herein found, or may hereafter waste. The 5th conclusion of law should be amended by omitting the words "and is entitled, upon the death of Hattie C. Smith, to receive one-third of said trust fund unimpaired," substituting, "and is presumptively entitled to share in one-third of said trust fund." The costs and allowances should not be paid out of the estate by sale of assets or otherwise, but judgment therefor should proceed against the defendants personally.

The interlocutory judgment, final judgment and order, amended pursuant to this opinion, should be affirmed, with costs of the appeal to the plaintiff.

JENKS, P. J., STAPLETON, RICH and BLACKMAR, JJ., concurred.

Interlocutory judgment, final judgment and order, as amended pursuant to opinion affirmed, with costs of the appeal to the plaintiff.

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THOMAS MURCOTT and Others, Copartners, Transacting Business under the Firm Name and Style of MURCOTT & CAMPBELL, Appellants, Respondents, v. THE CITY OF NEW YORK, Respondent, Appellant.

Second Department, December 29, 1917.

**Judgment — recovery of damages for injuries caused by sewer — subsequent suit in equity to enjoin maintenance of sewer — municipal corporations — city of New York — when notice of intention to sue not necessary.**

Where it was determined in an action at law, brought by landowners against a municipality, that the plaintiffs were entitled to substantial damages caused by a sewer illegally constructed or maintained, the judgment establishes the right of the plaintiffs to restrain the maintenance of the sewer system by a subsequent suit in equity.

In order to entitle the plaintiffs to maintain a suit for injunctive relief, or for damages, against the city of New York for the maintenance of the sewer it is not necessary to serve the defendant with notice of an intention to sue pursuant to section 261 of the city charter.

CROSS-APPEALS by the plaintiffs, Thomas Murcott and others, and by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 29th day of December, 1916, upon the decision of the court after a trial at the Kings County Special Term.

Plaintiffs appeal from the judgment in so far as it limits their recovery to the sum of \$2,000. The defendant appeals from such judgment in so far as it awards any damages whatever to the plaintiffs.

*Joseph M. Gazzam*, for the plaintiffs.

*George A. Green* [*Lamar Hardy*, Corporation Counsel, and *Thomas F. Magner* with him on the brief], for the defendant.

THOMAS, J.:

In a suit to restrain the maintenance of a sewer system it appeared that it had been determined in an earlier action at law between the same parties that as regards the plaintiffs' property, and to the substantial damage thereof, the system was illegally constructed or maintained. The status so established by judgment continuing authorized the plaintiffs to seek its abatement in a suit in equity, which would, indeed, have been in the first instance a proper remedy. In such suit the damages caused by the overflow of the sewers at several times into plaintiffs' property are incidental to the main relief, and it was not necessary for the purposes of the injunctive relief or the recovery of such damages to present to defendant claims or notice of intention to sue, or to commence the action pursuant to section 261 of the Greater New York charter, as amended by chapter 452 of the Laws of 1912. (*Sammons v. City of Gloversville*, 175 N. Y. 346; *Lamay v. City of Fulton*, 109 App. Div. 424; *Penfield v. City of New York*, 115 id. 502; *Ahrens v. City of Rochester*, 97 id. 480; *Flaxman v. City of New York*, 178 id. 935.) It is also considered

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that the plaintiffs were damaged by the overflow on January 7, 1915, but the ascertainment thereof should be remitted to the trial court, also the claims for damages at earlier periods may be examined. It is suggested that there should be a judgment for an injunction with suspension thereof for a time deemed necessary for the completion of the new sewer system. (*Sammons v. City of Gloversville*, 175 N. Y. 346.)

The judgment so far as it awards plaintiffs damages for the overflow of August 4, 1915, is affirmed. The plaintiffs should have the costs of this appeal.

Present — JENKS, P. J., THOMAS, STAPLETON, RICH and BLACKMAR, JJ.

Judgment so far as it awards damages to plaintiffs for the overflow of August 4, 1915, unanimously affirmed, with costs of this appeal to plaintiffs.

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ESTHER THOMAS, Respondent, v. ALEXANDER ZAHKA and WADDIE NAJJAR, Appellants.

Second Department, December 29, 1917.

**Mortgage — agreement as to priority of holders of junior mortgage — right of mortgagee having priority to satisfy mortgage debt and accept other security — failure to show bad faith.**

Where the defendants, holding a fifth mortgage on real estate, the value of which was exceeded by the prior liens, entered into an agreement with the plaintiff which recited that the interest of the defendants in the mortgaged debt was prior and superior to that of the plaintiff who owned the residue of the debt and that the defendants were authorized to accept payment of the bond and mortgage and to satisfy the same, or to foreclose on default and receive the proceeds of the sale, being liable only to account to the plaintiff for all moneys received in excess of the prior interest of the defendants in the mortgage, the defendants had a legal right to protect their superior interest by satisfying the mortgage for a sum of money and the issuance of another mortgage on other unincumbered property, there being no bad faith on their part. Under the circumstances the defendants were not trustees for the plaintiff and had the right to collect or exchange the security without waiting until the maturity of the mortgage.

The mere satisfaction of the mortgage by the defendants establishes no

ground of damages to the plaintiff since the mortgaged property was fully covered by prior liens.

*It seems*, however, that had the defendants been charged with bad faith they might have been called upon to justify their act.

RICH, J., dissented.

APPEAL by the defendants, Alexander Zahka and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 28th day of March, 1917, upon the decision of the court after a trial before the court, a jury having been waived.

The action was brought to recover for the alleged breach of a participation agreement regarding a bond and mortgage.

Defendants on June 6, 1913, made a loan of \$2,000 to one Plaisantin, and took as security a \$3,500 bond and mortgage, which was a fifth lien on Brooklyn property. This bond to the plaintiff dated June 2, 1913, was payable in three years with interest at six per cent per annum. It was made by Messrs. Gibbons, Stern and Gessford, as owners. The prior liens aggregated \$36,250. Plaintiff assigned this to defendants, with a participation agreement, reciting defendants' prior ownership therein up to \$2,000 and interest; that plaintiff owned the residue of said mortgage debt, but that defendants' \$2,000 interest is prior and superior to that of the plaintiff "as if the party of the second part held a first mortgage for \$2,000 and interest and the party of the first part held a second mortgage and subordinate to secure the balance of the mortgage debt."

"*Third.* That the party of the second part shall have all the rights of any holder of said bond and mortgage and is authorized to accept payment of said bond and mortgage and to execute a satisfaction piece therefor and in the event of any default on said bond and mortgage to foreclose the same and receive the proceeds of the sale from the referee; but the party of the first part shall, in any and every event, have the right to an accounting for all money received by said party of the second part in excess of the ownership of the party of the second part in said bond and mortgage. All rights and authority given under this article by the party of the second part are irrevocable.

"*Fourth.* That the party of the second part is to notify the party of the first part of any and every default on said bond and mortgage and of any and every foreclosure by making the party of the first part a defendant in any and every suit without further notice or demand, but the party of the second part shall be under no other obligation to protect the interest of the party of the first part under any such suit or upon any sale in any such foreclosure."

No part of defendants' loan to Plaisantin has been paid, so that it was overdue in the year 1914.

Up to March 20, 1915, defendants had received on account of interest on this \$3,500 bond the sum of \$383. Prior liens on the mortgaged premises then exceeded its value.

On March 20, 1915, defendants satisfied this mortgage for \$730 in money, and took a mortgage for \$1,000 on other incumbered property, which \$1,000 mortgage was subsequently lost and extinguished through foreclosure. Although the complaint does not charge bad faith, and merely avers the satisfaction and discharge of such mortgage, plaintiff has been decreed \$1,500 with interest, and costs.

*Abraham M. Davis and Adolphus D. Pape*, for the appellants.

*Frank E. Johnson, Jr.*, for the respondent.

PUTNAM, J.:

Defendants were vested with the title to this mortgage, and had the full right to protect their own superior interests. They did not become trustees for plaintiff. The two portions of the original debt were severed, as if secured by separate and successive mortgages. Notice to plaintiff by making her party to any foreclosure was, of course, necessary, since otherwise the decree and sale might be defective. (Wilt. Mort. Forec. § 116.) Defendants had agreed to pay over to, or account to, plaintiff for what she might be entitled to beyond defendants' \$2,000 interest. They had the right to collect, or exchange the security. (*Lowenfeld v. Wimpie*, 139 App. Div. 617; 203 N. Y. 646.) In view of the amount of prior incumbrances, this \$3,500 mortgage was speculative and precarious, depending, as it did, on future prospects, rather than on actual values.

In the absence of bad faith, defendants were not obliged to wait till after the mortgage matured, with the possible extinguishment of the security, before acting for their own protection. Such acts as exchanging, or compromising the security, were within the ample powers conferred by the two instruments, defendants, however, being always answerable for bad faith or waste, or like impairment of the security. (*State Bank v. Smith*, 155 N. Y. 185, 200.) It would have been prudent to have given plaintiff notice of this step, but if defendants were remiss in this respect, that alone did not amount to waste.

As plaintiff simply averred a satisfaction of the mortgage, she did not show any ground for damages, since the mortgaged property was fully covered by prior liens. Had bad faith been charged, defendants might have been called upon to justify their relinquishment of this security on the terms shown.

The judgment should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., MILLS and BLACKMAR, JJ., concurred; RICH, J., voted to affirm upon the opinion of Mr. Justice CROSEY at Trial Term [99 Misc. Rep. 333].

Judgment reversed and new trial granted, costs to abide the event.

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LEONARD W. ELY, Respondent, v. WILLIAM M. BARRETT, as President of ADAMS EXPRESS COMPANY, a Joint Stock Association, Appellant.

Second Department, December 29, 1917.

**Common carrier — agreement to transport dog through other carrier — interstate commerce — deviation from agreed route by carrier — burden of showing freedom of negligence cast upon carrier — proof justifying recovery.**

Where an express company specifically agreed to transport the plaintiff's dog to a city in a foreign State by another specified express company, but, in contravention of the agreement, did not deliver the animal to the specified carrier and carried it over its own line by a different route

and the dog died in transit, the burden of showing negligence of the defendant as required by the interstate bill of lading is not upon the shipper, but, on the contrary, as the carrier willfully deviated from the stipulated route, it became an insurer to the extent of proving that the death of the animal was not due to its own act or negligence.

The Carmack amendment to the Interstate Commerce Act does not disturb such common-law liability.

*It seems*, that under the law of this State a carrier, in the absence of a limiting contract, is liable as in the case of inanimate property for the transportation of live animals, except as to injuries arising from their nature and propensities and which diligent care cannot prevent.

Evidence examined, and *held*, sufficient to justify a finding that the defendant was negligent and that the plaintiff was entitled to recover.

APPEAL by the defendant, William M. Barrett, as president, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Nassau on the 14th day of June, 1917, upon the decision of the court after a trial before the court, a jury having been waived.

*Edward V. Conwell*, for the appellant.

*Alison M. Lederer*, for the respondent.

THOMAS, J.:

The plaintiff recovered a judgment for a dog, which defendant undertook to carry from East Williston, Nassau county, N. Y., to Palo Alto, Cal., by Wells Fargo & Company's Express from New York city. The defendant, in contravention of its contract, did not deliver the animal to the Wells Fargo Company, but sent it over its own line to Pittsburgh, Penn., beyond which point, at Wooster, O., the dog was found dead in the car. The parties executed the livestock contract and the defendant issued the uniform express receipt, according to the forms duly filed by defendant with the Interstate Commerce Commission. The plaintiff's contention is that by reason of the deviation from the stipulated route the defendant is liable for the loss as insurer; while the defendant's theory is that the carrier at common law does not insure against the consequences of the vitality of live freight, but is liable only for the results of its own negligence; that the parties have so stipulated in the form filed with the Inter-



state Commerce Commission, and that to allow a departure from such agreement would be a discrimination condemned by the Interstate Commerce Act. It is unnecessary to consider the Interstate Commerce Act farther than to note that under it the liability cannot be enlarged by the form of the action. (*Georgia, Florida & Alabama Ry. v. Blish Co.*, 241 U. S. 190.) In the contract the shipper releases the carrier "from all liability for delay, injuries to or loss of said animals \* \* \* from any cause whatever, unless such delay, injury or loss shall be caused by the Express Company or by the negligence of its agent and employees. \* \* \* The shipper agrees that as a condition precedent to recovery hereunder for loss or injury or damage to or delay in delivery of this shipment, such loss, injury, damage or delay shall be proved by the Shipper to have been caused by negligence of the carrier." The stipulation means that in the course of the specific service undertaken the carrier shall be liable for the loss caused by its negligence proven by the shipper. That put the burden of proof upon the shipper. But the carrier in fact departed materially from the agreement, and assumed to carry the dog by another route, for an increased distance under its immediate care and control, in a different territory, perchance under different climatic conditions, for delivery to a different connecting carrier, and in the course of such carriage the animal died. Do such facts relieve the shipper from further evidence that the death was caused by some act of defendant done or omitted, and impose upon the carrier the burden of showing not only due care, but also that the changed route did not enhance the risk of loss? I am at the moment dealing merely with the effect of the deviation on the burden of proof of negligence. It was something more than negligence to divert the carriage from the Wells Fargo Express at New York. It was a willful act. The Wells Fargo Company was the appointed bailee; the defendant became from New York a bailee by its own wrong. It may be said that no causal connection between the deviated route and the death of the dog can be proven. But the essential of the inquiry is whether the shipper must follow his dog into such regions as the carrier may negligently or willfully have placed it, and trace what befell the animal in the vicissitudes of the errant transporta-

tion. That is a burden the shipper did not undertake, and in the nature of the case it could not have been contemplated. It is not the spirit of the Interstate Commerce Act, affected by the Hepburn and Carmack amendments, that it is discrimination to require a carrier, who abandons an agreed service and assumes an authorized carriage, wherein the property was destroyed, to show that neither the aberration nor its conduct caused the loss. Reason and the necessity of the case require such conclusion. That judgment does not ignore the terms of the contract, (1) because it is equivalent to holding that the facts fulfill the burden that imposes the proof on the shipper; (2) because the carrier, by breaking up the concerted route, put the shipper at a risk he did not assume, subjected him to conditions not contemplated, and placed him at a disadvantage that embarrasses or precludes proof of the carrier's acts and omissions. The stipulated facts show the following report by the express messenger: "This dog was lying down in crate when received at Pittsburgh. Would not get up when loaded in the car and appeared to be sick. I placed her near the door to get air and gave her feed and water, but she would neither eat nor drink and would not get up when I spoke to her. As she did not appear to be suffering I thought she was all right. I looked in crate again after leaving Pittsburgh. She was still lying down. After leaving Wooster, O., I examined her again and found she was dead." What delay or exposure attended the diversion, where or under what conditions the sickness appeared, what was overlooked, if not beyond plaintiff's ascertainment, although presumptively within the knowledge of the erring carrier, were at least things that the shipper did not agree to prove. Moreover, when the dog was "loaded in the car" at Pittsburgh, she was sick, and yet without rest she was sent forward. I think that the court was quite justified in finding that the defendant was negligent. In *Cragin v. N. Y. C. R. R. Co.* (51 N. Y. 61) it was said that the carrier "does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from

responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore, in this case it was not sufficient to establish the common-law liability of the defendant to show that the hogs died from heat; but it was incumbent on the plaintiff to show further, that there was some negligence or omission of duty on the part of the defendant," and it was decided that the carrier could, by express contract, exempt itself from liability for its own negligence. But had the *Cragin* case shown that the hogs were diverted by the carrier from the stipulated route and died in an unauthorized locality, taken sick under unknown conditions, with no explanation or proof of care, there is no reason to believe that more evidence would have been exacted. The decision in this State is that the carrier, in the absence of a limiting contract, is liable as in the case of inanimate property for the transportation of live animals, except as to injuries arising from their nature and propensities, and which diligent care cannot prevent. (*Clarke v. Rochester & Syracuse Railroad Company*, 14 N. Y. 570; *Mynard v. Syracuse, etc., R. R. Co.*, 71 id. 180.) In the present case the carrier limited its liability to proved negligence, which, as regards the vitality of the animal, is the law. But the usual rule is that when a carrier deviates from the stipulated route he becomes an insurer, and responsible for all loss and damage to the goods, even unavoidable casualty. (*Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514.) In the case last cited it was said: "If it could be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier." If a carrier takes upon itself the transportation of animals by whatever way it will and against the agreement with the owner, if it does not become an insurer, it is not too much to hold that thereby the carrier takes the responsibility of exposing their vitality to the conditions of the route, so far forth, at least, as to explain that nothing concerning the diversion contributed to an animal's death. The Carmack amendment does not disturb such common-law liability. (*Cincinnati & Texas Pacific Ry. v. Rankin*, 241 U. S. 319,

App. Div.]

First Department, January, 1918.

326.\*) I cannot but think that the facts bring this case within the decision in *Galveston, H. & S. A. R. Co. v. Wallace* (223 U. S. 481, 492).

The judgment should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, STAPLETON, RICH and BLACKMAR, JJ.

Judgment unanimously affirmed, with costs.

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MAX RUBIN, Appellant, v. SAMUEL G. SIEGEL and MICHAEL GOODMAN, Respondents.

First Department, January 18, 1918.

**Practice — stay — when legal action not stayed pending suit in equity to enforce settlement of action — accord and satisfaction not executed.**

Where an agreement to settle an action made on the eve of trial was never carried out and the cause was restored to the calendar on the plaintiff's motion and the defendants took no appeal from the order, they are not entitled to a stay of the plaintiff's legal action until the determination of a suit in equity brought by them for the specific performance of the agreement to settle the prior action.

*It seems*, that the defense of settlement could be set up by the defendants in the legal action by a supplemental answer, and until the court in its discretion has refused to allow such supplemental answer the defendants have no ground for a stay, which would deprive the plaintiff of his right to a determination of the issues by a jury.

Defendants' affidavits examined, and *held*, insufficient to establish a settlement which would prevent the plaintiff from prosecuting his legal action, or confer upon the defendants the right to compel the enforcement of the settlement in equity.

An attempted settlement of a cause not fully executed is not available as a defense to the action, or as a basis of a suit in equity to enforce a settlement. DOWLING, J., dissented.

APPEAL by the plaintiff, Max Rubin, from an order of the Supreme Court, made at the New York Special Term and

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\* See 24 U. S. Stat. at Large, 386, § 20, as amd. by 34 id. 593, 595. § 7; 34 id. 838, Res. No. 47, and 38 id. 1196, 1197, chap. 176. Since amd. by 39 U. S. Stat. at Large, 441, 442, chap. 301.— [REP.]

entered in the office of the clerk of the county of New York on the 11th day of December, 1917, staying the trial of this action.

*Samuel Meyers* of counsel [*Henry E. Cohen* with him on the brief], *Morris & Samuel Meyers*, attorneys, for the appellant.

*Frank Walling* of counsel [*Abraham I. Smolens*, attorney], for the respondents.

SCOTT, J.:

A This action is for damages, stated at \$30,000, for breach of contract. When the case came on for trial negotiations were had looking to a settlement and it was finally agreed between counsel that defendants should pay to plaintiff the sum of \$3,750, and that the action should be discontinued. No written stipulation was entered into, but the cause was marked on the clerk's calendar as settled and discontinued. The proposed settlement was never carried out because the plaintiff claimed that other considerations than the payment of the sum mentioned had been agreed upon. The result was that, on plaintiff's motion, the cause was restored to the calendar for trial.

The defendants then paid \$3,750 into court and commenced an action in equity to enforce the agreement of settlement as they claim it was agreed to, and have now obtained the order appealed from, which stays further proceedings in this action until the trial and determination of the equity suit.

*First.* I am unable to see any ground for staying the law action. It has been restored to the calendar by an order from which no appeal has been taken. If the cause of action had been settled, so that the plaintiff could not recover thereupon that defense could be set up in a supplemental answer in this action at law. It is claimed that it is discretionary with the court whether to allow a supplemental answer, but until the court refuses to allow such supplemental answer the defendants have no ground to stay the plaintiff's action at law and compel the plaintiff to submit to a trial before a single judge and waive his right to try the issue of such settlement before a jury.

*Second.* Upon the facts shown by defendants' affidavits, there has been no settlement which would prevent the prosecution of the plaintiff's action for the full amount claimed and no right in equity to compel the enforcement of such a settlement. In *Smith v. Cranford* (84 Hun, 318) it is held: "To sustain the plea of an accord and satisfaction the agreement must be completely executed, and an accord without satisfaction or an accord partly executed cannot be successfully pleaded as a defense to an action. If an agreement was not an accord and satisfaction, but an accord executory, tender of performance is not equivalent to execution for the purposes of a defense to an action."

In that case the plaintiff had commenced an action against defendants to restrain them from interfering with a stream of water or doing anything to diminish the supply of water flowing to plaintiff's ponds or to impair the quality thereof. While such action was pending an agreement between the parties was entered into which provided "That the action should be discontinued" and further regulating the rights of the parties in respect to the use of this water.

Upon the execution of this instrument, fifty dollars was paid to the attorneys, but no other payment was ever made under it to the plaintiff. The defendants claimed that the agreement was a bar to the maintenance of the action. Presiding Justice BROWN in his opinion said: "The agreement was not an accord and satisfaction. It was an accord executory. Tender of performance has never been held for the purpose of this defense to be equivalent to execution. Accord without satisfaction or accord partly executed cannot be successfully pleaded as a defense. To sustain a plea of accord and satisfaction the agreement must be completely executed. [Citing cases.] The referee properly ruled that the agreement was executory and was not a bar to the maintenance of this action."

That case was affirmed upon this opinion in the Court of Appeals in 155 New York, 640, and is conclusive authority to the effect that the attempted settlement of this case not having been fully executed was not available as a defense to the action and, hence, was not sufficient to entitle this defendant to maintain an equity action to enforce such settlement.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN and SMITH, JJ., concurred; DOWLING, J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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NEW YORK INSTITUTION FOR THE INSTRUCTION OF THE DEAF AND DUMB, Appellant, v. THE CITY OF NEW YORK, Respondent.

First Department, January 18, 1918.

**Practice — action to determine claim to real property — claim of title by defendant — mode of trial — dismissal of complaint and exception thereto — findings not necessary — minute of exception taken in open court — preservation of right to appeal.**

Where in an action under sections 1638 *et seq.* of the Code of Civil Procedure to obtain an adjudication of the invalidity of defendant's claim of title to real property of which plaintiff claims to be in possession, the defendant in his answer claims title, the trial must be had as in an action of ejectment, that is to say, before the court and a jury.

By virtue of section 1021 of the Code of Civil Procedure where the court in such action sets aside a verdict for the plaintiff and dismisses the complaint, it is not necessary for the court to make any findings of fact and its refusal to do so is not an error which will furnish ground for an exception.

The plaintiff preserves its rights upon appeal where the record of the trial shows that it entered an exception in open court to the decision setting aside a verdict in its favor and dismissing the complaint.

Although after a dismissal of the complaint and the plaintiff's exception thereto taken in open court the defendant entered an order embodying the court's decision, the latter order was unnecessary and superfluous and did not require a new exception by the plaintiff where the clerk's minutes embodied the decision of the court.

Where a complaint is dismissed at Trial Term the clerk's minute of the plaintiff's exception made in open court is sufficient warrant for an entry of judgment and affords a proper foundation for appeal.

DOWLING, J., dissented, with opinion.

APPEAL by the plaintiff, New York Institution for the Instruction of the Deaf and Dumb, from an order of the

Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of June, 1917, denying its motion to compel the defendant to accept service of exceptions to the court's refusal to pass upon certain requests submitted by it.

*Thomas F. Conway* of counsel [*Thomas E. O'Brien* with him on the brief], for the appellant.

*Charles J. Nehrbas* of counsel [*Terence Farley* and *John R. Salmon* with him on the brief], *Lamar Hardy, Corporation Counsel*, attorney, for the respondent.

SCOTT, J.:

This action was brought under sections 1638 *et seq.* of the Code of Civil Procedure to obtain an adjudication of the invalidity of defendant's claim of title to certain real property of which plaintiff claims to be in possession, and for other incidental relief. The answer by way of defense sets up its own ownership. This defense under section 1642 of the Code of Civil Procedure required that the trial should be had as in an action of ejectment, *i. e.*, before the court and a jury. (See Code Civ. Proc. § 968.)

The cause was accordingly brought on for trial at a Trial Term. The court submitted two questions of fact to the jury, which were answered, but later, on motion of the defendant, the court set aside the verdict and dismissed the complaint, to which plaintiff duly excepted. The question whether or not the court was justified in this course is not brought up by the present appeal. After the dismissal of the complaint plaintiff filed and served upon defendant forty-eight proposed findings of fact and corresponding conclusions of law, the purpose apparently being to lay a foundation for exceptions to the court's refusal to find as requested, and accordingly, when the court refused to make any findings at all, plaintiff filed and served on defendant exceptions to the refusal to find. These exceptions defendant received but refused to retain.

Section 1021 of the Code of Civil Procedure provides that "The decision of the court, or the report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact



or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make any finding of fact."

If it was not necessary for the court to make any finding of fact, the refusal to do so was not error and furnished no ground for an exception.

If it be true that an exception to the dismissal of the complaint was essential to preserve plaintiff's rights upon appeal (*People v. Journal Company*, 213 N. Y. 1), the record submitted upon this appeal shows that plaintiff did in fact save its rights by entering an exception in open court when the court announced its decision.

It is true that the defendant afterwards entered an order embodying the court's decision announced at the close of the trial. This, however, was unnecessary and superfluous and did not require a new exception, since, the cause having been tried at Trial Term, the clerk's minutes embodied the decision of the court and were sufficient warrant for the entry of the judgment.

Cases constantly come before us in which the complaint has been dismissed at Trial Term wherein the only warrant for the entry of judgment is an extract from the clerk's minutes, and the only record of an exception is that taken in open court when the dismissal is ordered. It has never been held, nor so far as we are advised suggested, that this does not afford a sufficient and proper foundation to support an appeal.

The order appealed from must, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., LAUGHLIN and SHEARN, JJ., concurred; DOWLING, J., dissented.

DOWLING, J. (dissenting):

Had the trial court done no more than in open court grant the defendant's motion to set aside the verdict and dismiss the complaint (pursuant to the motion made at the close of the plaintiff's case, decision on which was reserved), I would agree with the opinion of Mr. Justice SCOTT that section

1021 of the Code of Civil Procedure applied and that no findings of fact were necessary to be made. But the court went further and entered an order embodying a narrative of the happenings upon the trial and thereafter, concluding with the setting aside of the verdict of the jury (no ground therefor being assigned in the direction), and also dismissing the complaint (though not formally directing the entry of any judgment). This order was treated as a decision and was made the basis of the judgment which followed. I think plaintiff had the right to except thereto, and not only to challenge what it contained, but to raise by exception the failure to include therein what it submitted by way of proposed findings. For this was not an ordinary case of a dismissal at the close of the plaintiff's case, but one made after the case had been tried out on both sides, before court and jury, and the jury had, at defendant's request, been called upon to answer specific questions, which they decided adversely to defendant. This left the case in the position of having two controverted questions of fact, decided by the jury, and many remaining questions of fact and law, to be decided by the court upon the whole case. The court appears to have passed on none of these, but has left the plaintiff with the only findings of fact made (which were found in its favor) set aside by the court, with no reason assigned, and with the inferences which must be unfavorable to plaintiff arising from such action. The defendant, by its request to go to the jury upon the two issues submitted, admitted that there was a question of fact to be determined, and that question had been tried out. I think, therefore, that the case came within the provisions of section 1022 of the Code of Civil Procedure, requiring the making of a decision by the court. This would as well enable the appellate court to make the appropriate findings in case of a reversal, and obviate the necessity of a new trial.

I, therefore, dissent from the affirmance of this order, and favor reversal and the granting of the motion made by plaintiff.

Order affirmed, with ten dollars costs and disbursements.

THE CITY OF NEW YORK, Respondent, *v.* THE WOODHAVEN  
GAS LIGHT COMPANY, Appellant. (Action No. 2.)

Second Department, December 21, 1917.

**Municipal corporations — city of New York — authority of city to  
regulate use of franchise by gas company.**

The right to regulate the use of a franchise by a gas light company is not exhausted by the regulations prescribed by the municipal authorities of the city of New York at the time of granting the consent which conferred the franchise.

Under the provisions of the Greater New York charter, the commissioner of water supply, gas and electricity has full jurisdiction, charge and control of the transmission of gas by pipes and conduits, which includes the locating of the pipes and prescribing the dimensions of the mains and filing maps and plans with the department, but he has no legislative authority to compel a gas company to pay inspectors appointed by him as a condition of allowing it a permit to install conduits and pipes for the use and transmission of gas.

The Legislature may, however, compel public service corporations to pay the expenses of public regulation.

APPEAL by the defendant, The Woodhaven Gas Light Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 7th day of May, 1917, pursuant to the direction of the court made upon a motion for judgment on the pleadings.

The judgment forever enjoined the defendant from further opening the public streets of the city and from further installing therein conduits and pipes for the use and transmission of gas, unless the defendant applies for, accepts and abides by the terms of a permit in writing from the commissioner of water supply, gas and electricity, embodying reasonable regulations, including a provision for the inspection of the work by inspectors to be appointed by the commissioner and employed at an expense to the defendant of \$100 a month.

*Jackson A. Dykman*, for the appellant.

*William E. C. Mayer* [*Lamar Hardy*, Corporation Counsel, *Terence Farley* and *Edward S. Malone* with him on the brief], for the respondent.

BLACKMAR, J.:

The provisions of section 61 of the Transportation Corporations Law (Consol. Laws, chap. 63; Laws of 1909, chap. 219) authorize a corporation duly organized for the purpose of supplying gas for light to lay conductors through the streets of a city, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe. In the city of New York the municipal authorities were held in *Ghee v. Northern Union Gas Co.* (158 N. Y. 510) to be the municipal assembly. The reasonable regulations were to be annexed to the consent and thereupon become an integral part of the franchise so granted. (*Parfitt v. Furguson*, 159 N. Y. 111.) The appellant claims that such regulations prescribed under the authority of the Transportation Corporations Law are exclusive of all others, and that the power to prescribe such rules, once exercised, is exhausted.

But the right to regulate the use of the franchise for the public good is part of the police power of the State, which is not exhausted when regulations are prescribed as a condition to the consent which operates to convey the franchise from the State to the corporation. As was said by Chief Judge RUGER in *People ex rel. New York Elec. Lines Co. v. Squire* (107 N. Y. 606): "The right to exercise this power cannot be alienated, surrendered or abridged by the Legislature by any grant, contract or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish." The right, therefore, to regulate the use of defendant's franchise is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent which conferred the franchise.

The distinction between those general regulations prescribed by the municipal authorities which govern the exercise of the franchise during its life, and those which may from time to time be prescribed as occasion requires, is suggested by Chief Judge PARKER in the *Ghee* case (pp. 522, 523) in the following words: "It is necessary that some administrative officer have the authority to determine on which side or in which portion of a street gas pipes shall be laid when the

authority to lay them has been conferred by the granting of a franchise for that purpose, as well as to determine, when the pipes are being laid, how much of the street shall be torn up and left open at any one time, the most effective method of restoring the street to its former condition and other details of the work, all of which are of no small importance in many of the streets of a great city like New York."

The sub-surface of streets in the city is enmeshed by a maze of sewers, subways, electrical conduits, water and gas mains, electrical conductors for trolley cars and other agencies, many of them installed under privately owned franchises. Some of the franchises were granted many years ago, in times of primitive simple conditions, under regulations prescribed by the municipal authorities. To hold that the city has no continuous control over the installation of these agencies, as conditions may change, would result in inextricable confusion. That the Legislature has power to authorize such control is too well settled to need further discussion. This case turns on the question whether the Legislature has authorized such control, and, if it has, upon what department or departments of the city it is conferred.

Section 383 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1907, chap. 383) declares that the president of a borough shall have cognizance and control of the issue of permits to use or open the streets. The language is general, and broad enough to cover any purpose for which the streets may be opened. This grant of authority may be limited by the grant of specific power of the same kind elsewhere. So section 528 gives to the commissioner of water supply, gas and electricity power, with the written approval of the president of the borough, to grant permits to take up the pavement and to excavate for the purpose of laying underground electrical conductors, or of constructing subways or of erecting poles. But the power thus granted to the commissioner is confined to opening streets for the purpose of electrical transmission, and we find no authority granted to him, either with or without the approval of the president of a borough, to permit opening the streets for gas pipes. Section 469 does not grant such

power. The section, as amended by chapter 602 of the Laws of 1916, or so much as is relevant to this inquiry, reads as follows:

" § 469. The commissioner of water supply, gas and electricity shall have jurisdiction, charge and control: \* \* \*

" 5. Of the making and performance of contracts when duly authorized in accord with the provisions of this act, and for the execution of the same in the matter of furnishing the city, or any part thereof, with gas, electricity or any other illuminant or of steam; of the selecting, locating and removing and changing of lights for the use of the city; of the inspecting and testing of gas and electricity used for light, heating and power purposes, electric meters, electric wires and of all lights furnished to said city; and of the use and transmission of gas, electricity, pneumatic power and steam for all purposes in, upon, across, over and under all streets, roads, avenues, parks, public places and public buildings; of the construction of electric mains, conduits, conductors and subways in any such streets, roads, avenues, parks and public places, and the granting of the permission to open streets, when approved by the borough president, and to open the same for the purpose of carrying on therein the business of transmitting, conducting, using and selling electricity, steam or for the service of pneumatic tubes."

The power so conferred on the commissioner to grant permits to open streets when approved by the borough president, and to open the same, is confined to the transmission of electricity, steam, or for the service of pneumatic tubes. This is the plain reading of the written words. But, in addition thereto, he is given jurisdiction, charge and control of the use and transmission of gas through and under the streets. These words must be given a reasonable significance. It is too narrow to confine the jurisdiction, charge and control over transmission to prescribing the pressure which effects the transmission, for that matter is governed by another section (§ 522, as amd. by Laws of 1905, chap. 735). We think that the commissioner has no power to permit the opening of the street nor to regulate the relaying of the pavement, for these functions are vested in the president of the borough; but that he has full jurisdiction, charge and

control of the transmission of gas by pipes and conduits. This, we think, embraces among other things the locating of the pipes and prescribing of the dimensions of the mains, and filing maps and plans with the department.

The real, vital question in this case is, whether the court shall forbid the work to proceed unless the defendant will agree to pay inspectors appointed by the commissioner at the rate of \$100 per month. It may be that performance of the duties cast on the commissioner by law requires the aid of inspectors to supervise the work, but we cannot find, anywhere, statutory authority to impose the charge on the gas company; nor can we imagine any principle which warrants the commissioner in shifting upon the defendant, without legislative authority, any portion of the expense of performing his duties. We are confirmed in our view by the fact that the Legislature has apparently considered it necessary to confer on the president of a borough authority to require payment of the expense of inspection as a condition to granting a permit to open the street for, among other purposes, laying down gas pipes. (Greater N. Y. Charter, § 391, as amd. by Laws of 1916, chap. 496.) We do not doubt the power of the Legislature to compel public service corporations to pay the expense of public regulation; but, unless conferred by statute, the power does not exist in the city government or any department or official thereof. The decision in *People ex rel. Consolidated Subway Co. v. Monroe* (85 App. Div. 542) is not opposed to this view, for in that case the relator was under a contract made with the board of commissioners of electrical subways, to which the commissioner of water supply, gas and electricity was successor, which bound the relator to pay all reasonable expenses of inspection, and which contract was confirmed by statute (Laws of 1887, chap. 716, § 6).

The judgment should be reversed and a new trial granted, with costs of this appeal and disbursements to be paid by plaintiff.

JENKS, P. J., STAPLETON, RICH and PUTNAM, JJ., concurred.

Judgment reversed and new trial granted, with costs of this appeal and disbursements to be paid by plaintiff.

In the Matter of the Application of PAUL GAIGNAT, Respondent, for a Writ of Certiorari Commanding HERBERT S. SISSON, as State Commissioner of Excise, and WALTER RAYNOR, as Special Deputy Commissioner of Excise for the County of Nassau, Appellants, to Certify and Return, etc., All Proceedings Had, etc., Relating to the Refusal, etc., to Issue to the Said PAUL GAIGNAT a Liquor Tax Certificate, etc.

Second Department, December 21, 1917.

**Intoxicating liquors — power of commissioners appointed to reduce number of places trafficking in liquors — when their determination not void so as to entitle State Commissioner to make new designation.**

Under the provisions of section 8 of the Liquor Tax Law, as amended by Laws of 1917, chapter 623, providing that where a town contains one or more villages, the commission shall reduce the number of places in each of such villages, and in the territory of such town outside of such villages "as nearly as may be" in proportion to the number of places where trafficking in liquors was engaged in at the time of investigation, the commission may take into consideration not only mathematics but their practical experience in business affairs, their acquaintance with commercial and social conditions of the town and the information as to the character of the places derived from the investigation.

Hence, where the commission has designated ten places in a village, but by applying a strict mathematical ratio said village would be entitled to only nine places, said designation is not void and does not entitle the State Commissioner of Excise to make a new designation.

There is nothing in the statute suggesting that the State Commissioner is given any power of supervision over the local commissions whose action the statute declares to "be final and conclusive."

APPEAL by the defendants, Herbert S. Sisson, as State Commissioner of Excise, and another, from an order of the Supreme Court, made at the Nassau Special Term and entered in the office of the clerk of the county of Nassau on the 8th day of October, 1917, directing the Special Deputy Commissioner of Excise for the county of Nassau to issue to the relator a liquor tax certificate for his place in the village of Rockville Center.



Acting under the provisions of chapter 623 of the Laws of 1917, a commission consisting of three members appointed, pursuant to said act, by the town board of the town of Hempstead, made a report by which they determined that the number of places within the village of Rockville Center where traffic in liquor might be conducted during the year commencing October 1, 1917, should be reduced from fourteen to ten, and designated the relator's premises as a place where traffic in liquors might be conducted during the ensuing year. The relator thereupon duly made application to the Special Deputy Commissioner for the county of Nassau for a certificate for the term of one year beginning October 1, 1917. The application was refused by direction of the defendant the State Commissioner of Excise, who, disregarding the designation of the local commission as void, had himself made a designation in place thereof, which reduced the number of places in Rockville Center to nine, excluding the relator's place therefrom. The relator thereupon brought this proceeding, which resulted in an order directing the defendant the Special Deputy Commissioner of Excise for the county of Nassau to issue the certificate to the relator, and the defendants have appealed to this court.

*C. S. Ferris* [*Harry D. Sanders* with him on the brief], for the appellants.

*James A. Blanchfield* [*Daniel E. Lynch* with him on the brief], for the respondent.

BLACKMAR, J.:

The Liquor Tax Law (Consol. Laws, chap. 34; Laws of 1909, chap. 39) was amended by chapter 623 of the Laws of 1917, which went into effect May 22, 1917. The purpose of that portion of the amended act which we are considering was, in the language of the act itself, "to reduce, on and after October first, nineteen hundred and seventeen, the number of places or premises in or on which the business of trafficking in liquor may be conducted under certificates issued under subdivision one of this section, in cities having by the last State census a population of fifty-five thousand or less and in towns, to a ratio of not exceeding one certificated

place or premises for each five hundred of the population of such city or town." (§ 8, subd. 9, ¶ c, as *amd. supra.*) For this purpose the act directed the town board of each town to appoint a commission of three to investigate, and, if conditions required a reduction in number, to report a designation of the places for which certificates might be issued for the ensuing year. The necessary result would be to exclude some places from the privilege of renewal. This delicate matter is referred by the act to representatives of the locality affected. In this case the State Commissioner of Excise has set aside the designation by the local commission, substituting his own in its place, and legislative warrant for this course is supposed to be found in the following provision of the act:

"(4) The determination of such commission shall be final and conclusive. In case such commission shall fail to designate on or before September first, nineteen hundred and seventeen, the places in such city or town for which liquor tax certificates may be issued, or in case the mayor of a city or the town board of a town refuses or fails to appoint such commissioners, or if for any other cause such designation is not made, the State Commissioner of Excise shall designate said places."

The State Commissioner claims that this law empowers him to act because the designation of the local commission is void as made in violation of the following provision:

"Where a town contains one or more villages or parts of villages, and there are two or more places in each of such villages or parts of villages in such town, and in the territory of such town outside of such villages, for which certificates under subdivision one of this section have been issued, the commission in making its determination hereunder shall reduce the number of places in each of such villages and parts of villages, and in the territory of such town outside of such villages, as nearly as may be in proportion to the number of places where trafficking in liquors was engaged in at the time of the investigation."

In applying the strict mathematical ratio, the village of Rockville Center would be entitled to nine places as fixed by the State Commissioner, and not to ten, as designated by

the local commission; and the question is whether such a departure from accurate mathematical computation renders the designation of the local commission void as though it had not acted at all. The legislative mandate laid upon the commission in respect to the distribution of certificates between the villages and rural districts of a town is not to obey without deviation a mathematical rule, as it is where they are commanded to reduce the number of licensed places so that they shall not exceed one for each five hundred of the population; but the commission is required to reduce the licensed places in the villages and rural districts of the town "as nearly as may be" in proportion to the number of places where traffic in liquors was engaged in at the time of the investigation. The words "as nearly as may be" must be given the meaning and scope required by the legislative intent, both as to the purpose of the act and the method of its administration. It is true that, in attempting to work out the proportional reduction, fractions might and probably would appear, and, therefore, absolute mathematical accuracy cannot be attained, and it is suggested that the words "as nearly as may be" were inserted to meet this situation, and confer no discretion on the commission further than is involved in eliminating fractions. But having in view the whole scope of the act, we think the words authorize the commission to take into consideration other things than mere mathematics. The administration of the law was committed to local boards called commissions, appointed by local authority. The law expressly insists on local qualifications. It reads: "The persons so appointed as members of such commission shall be persons of good standing in the community and shall have had practical experience in business affairs and be acquainted with commercial and social conditions in the city or town for which they are appointed." They are then commanded to "investigate as to the location of places within such city or town where trafficking in liquors is engaged in under liquor tax certificates \* \* \* and may inquire as to the conduct of such business at such places." When the commission, so qualified, has made such investigation, then it must determine which of the existing certificated places shall survive. The exercise of this power rests on

discretion, qualified only by the requirement that when the town contains one or more villages, the proportion of certificated places shall be maintained "as nearly as may be." I think that these words authorize the commission to take into consideration, not only mathematics, but their "practical experience in business affairs," their acquaintance "with commercial and social conditions" of the town, and the information as to the character of the places derived from the investigation. It may be that these considerations will prevent maintaining the mathematical proportion between the village and the rural district. We must assume that such considerations did govern the commission in allotting to the village of Rockville Center ten certificated places instead of nine, which would be the result of a purely mathematical computation excluding all other considerations. If the commission is simply to make a mathematical computation, which the State Commissioner of Excise can revise and, if mathematical error be found, treat its whole action as void, why should the statute provide that "The determination of such commission shall be final and conclusive?" It is absurd to confer on any body the power to conclusively determine a mathematical problem. The power is appropriate only to a determination upon which reasonable men may differ, in other words, to a judicial determination or one which involves the exercise of discretion. In *People ex rel. Carter v. Rice* (135 N. Y. 473) the reasoning and decision of the court confirms our view of the effect which should be given to the words "as nearly as may be" in this case. The act shows the plain legislative intent that its administration shall be by local commissions; and only in event of their failure to act, and to prevent a failure to accomplish the primary purpose of the law, which is to reduce the number of certificated places, is power given to the State Commissioner. There is nothing in the act suggesting that the State Commissioner is given any power of supervision over the local commissions. The court should not subvert the legislative intent by a strained construction of the act. The local commission has acted; its action is final and conclusive, as the statute declares; and no power exists in the State Commissioner to set it aside and to substitute his own designation.

Our decision seems to differ from that of this court in its Fourth Department in the case of *People ex rel. Gstalter v. Sisson* (179 App. Div. 610).

The order should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., THOMAS, STAPLETON and RICH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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JOHN J. STEVENS, Appellant, v. MARIE HALSTEAD, Individually and as Administratrix, etc., of CHARLES E. STEVENS, Deceased, Respondent.

Second Department, December 21, 1917.

**Parent and child — adoption of adult — adoption alleged to be procured by undue influence for the purpose of acquiring property — complaint stating cause in equity to annul adoption — relief should be sought in equity not in Surrogate's Court.**

Since the enactment of chapter 352 of the Laws of 1915, the adoption of a person of the age of twenty-one years and upward is permitted, and no consents save that of the person adopted and that of the foster parent are required.

As such adoption effects the devolution of property on the death of the foster parent and has the same result as a last will and testament, the courts, in determining the validity of the adoption, should apply the same tests as in the case of a testamentary act, and to that end undue influence and lack of testamentary capacity on the part of the foster parent may be shown to nullify the adoption.

The complaint in a suit in equity brought by an heir and next of kin to set aside an adoption made by his ancestor, which in substance alleges that the person adopted was a woman forty-seven years of age and was living apart from her husband in adulterous intercourse with the decedent, and that for the purpose of securing his property without the necessity of procuring the probate of a will, coerced and induced the decedent, a man infirm mentally and physically, to adopt her, states facts which allow proof of undue influence.

For a man to adopt a woman with whom he is living in adultery is against public policy, and to attempt to obtain an approval of such adoption by the surrogate is a fraud upon the court.

The heir and next of kin of such deceased foster parent may maintain a suit in equity to annul the adoption, and is not restricted to a motion before the surrogate to vacate it.

App. Div.]

Second Department, December, 1917.

An adoption proceeding is not judicial, but merely involves the approval by the surrogate or the county judge of a contract between the parties. Decisions which hold that the surrogate has jurisdiction to vacate an order approving and confirming an adoption are disapproved.

APPEAL by the plaintiff, John J. Stevens, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orange on the 27th day of February, 1917, dismissing the complaint at the opening on a trial at the Orange Special Term.

*Joseph Rosch* [*Ward De Silva* with him on the brief], for the appellant.

*John Bright* [*Alton J. Vail* with him on the brief], for the respondent.

BLACKMAR, J.:

The complaint alleged that the plaintiff was the only heir and next of kin of one Charles E. Stevens, who died intestate on November 23, 1916; that the defendant, a married woman forty-seven years of age, separated from her husband, lived with the said decedent, who was seventy years of age and physically and mentally infirm, ostensibly as his housekeeper but really as his mistress; that defendant, with intent to obtain the property of decedent by coercion, fraud and deceit, induced decedent to adopt her as his child, which he did on September 15, 1916; that she continued her former relations with him for two months, when he died, and that thereafter she applied for and obtained letters of administration upon his estate, which was of the value of \$10,000, upon the fraudulent representation of her relationship created by the adoption. Judgment is asked that the adoption and letters of administration be set aside, and for other relief.

The decision of this appeal requires the consideration of two questions, *first*, whether, on the allegations of the complaint plaintiff is entitled to relief; and, if so, *second*, whether such relief should be granted in a suit in equity, or the parties remitted to a motion to the surrogate, who made the order of adoption.

Until the enactment of chapter 352 of the Laws of 1915, adoption was confined to minors. By that act, for the first time in this State, adoption of a person of the age of twenty-one years and upwards was permitted. (Dom. Rel. Law

[Consol. Laws, chap. 14; Laws of 1909, chap. 19], § 110, as amd. by Laws of 1915, chap. 352.)\* In such case no consents other than that of the person to be adopted and of the foster parent are required. (Dom. Rel. Law, § 111, as amd. by Laws of 1913, chap. 569, and Laws of 1915, chap. 352.) Nothing is necessary to effect an adoption of a person over the age of twenty-one years but a contract between the foster parent and such person, and appearance before the surrogate or county judge, followed by an order of the surrogate or judge allowing and confirming such adoption, which order must be made if the surrogate or judge is satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby. (Dom. Rel. Law, §§ 111, 112, 113, as amd. by Laws of 1915, chap. 352; Id. §§ 112, 113, as amd. by Laws of 1916, chap. 453.) The effect of adoption is prescribed by section 114 of the Domestic Relations Law (as amd. by Laws of 1915, chap. 352, and Laws of 1916, chap. 453). So a contract between two adults, allowed and confirmed by the surrogate without notice to or the knowledge of any other person, may be made to effect a devolution of property on the death of the foster parent, and so accomplish the same result as a valid last will and testament. In the case at bar it has had such result, and the parties so intended. The defendant, a stranger to the blood of decedent, takes his property by a proceeding which is not surrounded by the safeguards prescribed for a testamentary act. We think in such a case the courts should, in determining the validity of the adoption, apply the same tests as in case of a testamentary act. The want of testamentary capacity in the foster parent and the exercise of undue influence by the adopted person should, at the suit of the next of kin or heir at law, be sufficient to nullify the act. There are no allegations in the complaint that the decedent was of unsound mind; but we think that under the allegations of the complaint, liberally construed with a view to substantial justice, undue influence may be proved. In *Phillips v. Chase* (203 Mass. 556) a decree of adoption was attacked; and, under a finding of a jury that the decedent was unduly influenced in making the

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\* Since amd. by Laws of 1917, chap. 149.— [REP

adoption by the person who claimed the decedent's estate thereunder, the adoption was nullified. It is alleged in the complaint in the case at bar that defendant, a married woman forty-seven years old, living apart from her husband, in adulterous intercourse with decedent, and for the purpose of securing his property without the necessity of procuring the probate of a will, coerced and induced decedent, a man infirm mentally and physically, to adopt her. Surely it is against public policy to admit a couple living in adultery to the relation of parent and child. This meretricious relationship, and the undue influence which imposed the will of defendant on decedent, condemn the adoption. It is not only against public policy, but it is a fraud on the surrogate to induce him to approve the relation of parent and child between an adulteress and her aged and infirm paramour. If the facts alleged in the complaint are established, the adoption should be annulled.

We have also reached the conclusion that relief may be granted in this action; and do not uphold respondent's claim that a sufficient remedy exists in an application to the surrogate under section 2490 of the Code of Civil Procedure to vacate the order allowing and confirming the adoption. In *Matter of Ziegler* (161 App. Div. 589), which was an appeal from an order of the Surrogate's Court denying a motion to set aside an agreement for, and the consent of the surrogate to, the abrogation of an adoption, Mr. Justice SCOTT, writing for this court in its First Department, doubted whether the Surrogate's Court had jurisdiction to entertain the proceeding and to grant the relief desired, and said: "The surrogate in giving his consent acts in his administrative and not in his judicial capacity, nor is the consent signed by him in any sense a decree or order of the Surrogate's Court. If the attempted act of abrogation is insufficient under the statute it may be attacked even collaterally, in any proceeding, and if for any reason it be deemed necessary that it be revoked in a judicial proceeding only a court of equity would have jurisdiction so to revoke it." We perceive no difference in the nature of the act between the consent of the surrogate to the contract of abrogation given under section 116 of the Domestic Relations Law (as amd. by Laws of 1915, chap. 352), and the order allowing and confirming the adoption,



made pursuant to section 113 (as amd. by Laws of 1915, chap. 352, and Laws of 1916, chap. 453). In both cases the surrogate is required, before approving, to be satisfied that the adoption in the one case and the abrogation in the other will be for the best interests of the person adopted. In both cases he, representing the public interests in domestic relations, is approving a contract, and his approval gives it the prescribed statutory effect, in the one case creating the legal status of parent and child, and in the other terminating it. The fact that in the one case his approval is called an order, and in the other a consent, does not alter the nature and quality of the act. A proceeding for adoption under the statute is not a judicial proceeding. There are no parties, no issue between them, and no judgment determining their relative rights and duties by application of rules of law to the facts as found. The proceeding is simply a contract of adoption, which is not effective without the approval of the surrogate or a county judge. The surrogate does not pass on the validity of the contract. The only judicial determination which he makes is that the adoption will promote the moral and temporal interests of the person to be adopted. In the case at bar the plaintiff does not seek to review the determination of this matter by the surrogate, but attacks the validity of the underlying contract on grounds of which only a court of equity can take cognizance. The suit is, therefore, properly brought in a court of equity, and it was so held by this court in *Matter of McDevitt* (176 App. Div. 418). This point was neither raised nor passed upon in *Matter of MacRae* (189 N. Y. 142), and we cannot approve the decisions which hold that the surrogate has jurisdiction to vacate the order allowing and confirming the adoption. (*Matter of Moore*, 72 Misc. Rep. 644; *Matter of Johnston*, 76 id. 374.)

We think the complaint states a cause of action, and that relief may be granted in this court.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

THOMAS, STAPLETON, MILLS and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

WILLIAM W. CLINE, Appellant, v. NORTHERN CENTRAL RAILROAD COMPANY and ERIE RAILROAD COMPANY, Respondents.

Third Department, December 28, 1917.

**Master and servant — railroads — negligence — injury to brakeman by catching glove on projecting bolt on car — liability of company for defects in car over which it had assumed control — evidence as to custom in reference to inspection — erroneous charge as to inspection.**

In an action by a switchman against his employer and another railroad company to recover for personal injuries, it appeared that the plaintiff in the course of his duties was engaged in placing a freight car on a switch in the yard of the second defendant; that in removing another car belonging to a third company which had been brought into the yard and placed on the switch by the second defendant, plaintiff went to the top thereof to release the brake and in descending the ladder on the car his glove caught on a projecting bolt and he was thrown to the ground and sustained injuries.

*Held*, that the plaintiff's employer, having assumed control over the car in question for the purpose of removing it, and having directed the plaintiff to work on and about it, was not entitled to a dismissal of the complaint on the ground that it had no control over said car and no opportunity of inspection thereof.

Questions by which the defendants proved, by a number of witnesses connected with various railroad companies, that it was not customary for such companies to give their inspectors instructions to condemn or repair cars on which there were projecting bolts fastening the stiles on a ladder to the car, and that the inspectors did not report such a condition as defective or take measures to have the same repaired, were not entirely free from criticism. The real inquiry should have been as to the custom of railroad companies in reference to existing projecting bolts on the stile of a ladder.

It was error for the trial justice in charging the jury to tell them that said witnesses of the defendants had testified that they would not regard the condition in question as defective.

A further charge "that the usual and ordinary inspection commonly adopted by other railroads is not negligence" constituted reversible error.

APPEAL by the plaintiff, William W. Cline, from judgments of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Chemung on the 31st day of December, 1914, and the 5th day of January,

1915, respectively, upon the verdict of a jury, and also from an order entered in said clerk's office on the 8th day of January, 1915, denying plaintiff's motion for a new trial made upon the minutes.

Two separate judgments were entered, one dismissing the complaint as to one defendant, the other as to the other defendant.

The plaintiff was a switchman in the employ of the Northern Central Railroad Company. In the course of his duties he was engaged in placing a freight car on a switch in the yard of the defendant Erie Railroad Company in Elmira. A number of cars were already on the switch and it was necessary to remove one in order to make a place for the car which was to be placed thereon. The car so removed belonged to the Wheeling and Lake Erie Railroad Company and was known as No. 20072. It had been brought into the yard and placed on this switch by the defendant Erie Railroad Company. While this car was being removed plaintiff went to the top thereof to release the brake and in descending the ladder at the end of the car his glove caught on a projecting bolt and he was thrown to the ground and sustained serious injuries. At least such was the claim of the plaintiff as to the manner in which the accident happened and so the jury might have found from the evidence. The bolt was on the upright stile or side of the ladder and between the lower rounds thereof and fastened the ladder to the car. The testimony shows that it projected an inch outward from the nut and about an inch and a half from the stile of the ladder.

*John F. Murtaugh*, for the appellant.

*Diven, Turner & Henry* [*A. S. Diven* of counsel], for the respondent Northern Central Railroad Company.

*Stanchfield, Lovell, Falck & Sayles* [*Halsey Sayles* of counsel], for the respondent Erie Railroad Company.

COCHRANE, J.:

The court submitted to the jury the question as to whether this projecting bolt constituted a defective condition of the car in respect to which the defendants were negligent and

whether in the exercise of ordinary care they should have inspected the car and by inspection discovered its dangerous condition. The jury by their verdict have exonerated the defendants from liability and the question on this appeal is whether there is any ruling of the trial justice which necessitates a reversal of the judgments in their favor. The defendants do not contend on this appeal that they were entitled to a dismissal of the complaint as matter of law except that the Northern Central Railroad Company does so contend on the ground that it had no control over car No. 20072, and no opportunity of inspection. Having assumed control over it for the purpose of removing it, and having directed the plaintiff to work on and about it, we think this argument cannot be upheld.

The defendants called a number of witnesses who were connected with different railroad companies and proved by them that it was not customary for such companies to give their inspectors instructions to condemn or repair cars on which there were projecting bolts fastening the stiles on a ladder to the car, and that the inspectors did not report such a condition as defective or take measures to have the same repaired. These questions were not entirely free from criticism for while the defendants had the right to prove general usage and custom as bearing on the question of negligence (*Shannahan v. Empire Engineering Corporation*, 204 N. Y. 543; *Croghan v. Hedden Construction Company*, 147 App. Div. 631; *Marus v. Central Railroad Company*, 175 id. 783), the real inquiry should have been as to the custom of railroad companies in reference to existing projecting bolts on the stile of a ladder. The questions under review merely called for any rule or instructions to the inspectors in reference thereto, and whether the inspectors had reported or condemned such a condition. The testimony was really misleading because it would necessarily have been the same if no car with a projecting bolt had ever existed. The questions did not fairly go to the extent of eliciting the information that when such a condition actually existed it was consciously permitted to continue, and that the inspectors paid no attention thereto, and were not required or expected to do so. But passing this criticism, an entirely

improper application was made of this evidence. The trial justice in charging the jury twice told them that these witnesses of the defendants had testified that they would not regard the condition in question as defective. This was an erroneous interpretation of the testimony and conveyed to the minds of the jury an exaggerated idea of its importance. Such testimony if offered would be incompetent. But more than this, the court further charged the jury on request "that the usual and ordinary inspection commonly adopted by other railroads is not negligence," and to this charge an exception was taken by the plaintiff. The authorities cited make it plain that such evidence is inconclusive and is only received for what it is worth and that the weight thereof is entirely for the jury. This instruction to the jury was clearly erroneous and constituting as it did the last word of the court to them on this question, the error was of sufficient importance to require a reversal of the judgment. For a similar charge the judgment was reversed in *Croghan v. Hedden Construction Company* (*supra*) and what was stated by Mr. Justice WOODWARD in his opinion in that case in assigning such an error as the sole cause for a reversal of the judgment is equally applicable here, viz.: "We might be of opinion, therefore, that the judgment should be affirmed, except for the fact that the learned trial court erred in its charge to the jury in instructing them that 'if a manner of operating the hoist was one in common general use at the time in the locality where such operations were going on by many contracting concerns, then it must be held to have been a proper one.' What other contractors were doing might be some evidence of what constituted a proper hoisting device, but a hoisting device which was in fact dangerous to life and limb beyond the reasonable necessities of the work could not, as a matter of law, be regarded as a proper device simply because others were using the same style of apparatus."

The judgment and order must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide the event.

NICHOLAS D. DOXEY, Respondent, v. COATES, BENNETT &  
REIDENBACH, INC., Appellant.

Third Department, December 28, 1917.

**Sale — action for breach of contract — failure to make prompt shipment — counterclaim by purchaser for loss from rescission of contract for resale — failure of vendor to make prompt delivery under one contract no excuse for purchaser's rejection of tender under another contract made at same time.**

In an action for breach of contract of sale it appeared that the plaintiff on April eleventh made a written contract to sell the defendant several tons of steel scrap; that the defendant resold the steel and the plaintiff had knowledge when he made the contract that the defendant had sold or expected to resell. The contract read "shipment to be made prompt." It appeared that in the trade "prompt" shipment required shipment within thirty days. Plaintiff made shipments on May third and fifth, but no other shipments being made the defendant, after urging by mail the necessity of prompt delivery, canceled the contract on May thirteenth, because of delay. The parties also made a separate contract whereby the plaintiff sold to the defendant several tons of annealing pots, the contract providing for "shipping instructions when the material is ready to be loaded;" that on April twenty-eighth plaintiff requested shipping instructions which were not given and subsequently renewed its tender but defendant refused to accept.

*Held*, on all the evidence, that the plaintiff was guilty of an inexcusable breach of its contract to deliver the steel scrap, but that the defendant is liable for the purchase price of the carload of steel shipped on May fifth, for which it had not paid, and for damages for not accepting the annealing pots.

"Prompt" shipment means expedition and admits of less delay than would be permissible under a contract to make delivery within a reasonable time.

The plaintiff's breach of contract in respect to the steel scrap did not constitute a sufficient reason for the rejection of the annealing pots, as the contracts were separate.

Since the defendant resold the steel scrap with reference to the plaintiff's contract, and the vendee rescinded because of delayed shipments by plaintiff, the defendant was entitled to counterclaim for loss of profits on the resale.

**APPEAL** by the defendant, Coates, Bennett & Reidenbach, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of

Chemung on the 20th day of March, 1917, upon the decision of the court, a jury having been waived, with notice of an intention to bring up for review the decision of the court pursuant to which the judgment was entered and also the bill of exceptions filed in the office of the clerk of the county of Chemung on the 27th day of March, 1917.

*C. A. Crandall*, for the appellant.

*Herendeen & Mandeville* [*E. W. Personius* of counsel], for the respondent.

COCHRANE, J.:

On April 11, 1916, plaintiff made a written contract to sell the defendant from 200 to 300 tons of No. 1, heavy melting steel scrap at sixteen dollars per gross ton, f. o. b. Elmira, N. Y. The scrap was in the yard of D. & H. Rubin in the city of Elmira, from whom the plaintiff had purchased the same, and the 200 to 300 tons specified in the contract with defendant was an estimate of the quantity in the yard of Rubin. The defendant, doing business in Rochester, resold the steel scrap to a concern in Buffalo, and the plaintiff was aware when he made his contract with the defendant that the latter had sold or expected to resell the same on the strength of its contract with him. The contract between the plaintiff and the defendant contained the provision: "Shipment to be made prompt."

On May third, plaintiff shipped one carload containing 56,300 pounds, for which the defendant paid. On May fifth another carload containing 55,500 pounds was shipped, for which the defendant has not paid. Presumably these shipments were made directly from Elmira to the defendant's vendee in Buffalo. No other shipments were made. On May thirteenth the defendant canceled the contract because of delayed delivery.

The parties also made a separate contract whereby the plaintiff sold to the defendant not more than twenty tons of burnt annealing pots, at sixteen dollars per gross ton, f. o. b. Elmira, the contract providing, "shipping instructions when the material is ready to be loaded." There was no other provision as to the time when this material should be shipped.

On April twenty-eighth plaintiff wrote the defendant asking for shipping instructions for the annealing pots, to which letter the defendant replied on April twenty-ninth that the market where it had resold this material was under embargo, and requesting the plaintiff to hold it until the embargo was raised. Subsequently the plaintiff renewed its tender of these annealing pots but the defendant refused to accept the same.

The trial justice held that the plaintiff was not in default in the delivery of either the steel scrap or the annealing pots, and awarded the plaintiff a judgment for \$396.43, being the unpaid purchase price of the carload of the steel scrap shipped on May fifth, and for \$504 damages because of defendant's refusal to accept the balance of the steel scrap, and for \$184.68 damages because of the defendant's refusal to accept the annealing pots, amounting in all, with interest, to \$1,132.85.

We think the learned trial justice was in error in his conclusion that the defendant wrongfully refused to accept the steel scrap. The contract for this called for prompt shipment. This means expedition and admits of less delay than would be permissible under a contract of delivery within a reasonable time. (*Tobias v. Lissberger*, 105 N. Y. 404, 410, 412; *Binger Company v. Blumberg*, 76 Misc. Rep. 432.) The defendant alleges in its answer that in the scrap metal business, shipments under contract specifying prompt shipment must be made within thirty days and that it was the intention of the parties herein that the property should be so shipped. We shall, therefore, assume that the plaintiff had until May eleventh, thirty days after the contract was made, to ship the steel scrap, although it is very clear from the evidence that it might all have been shipped within a much shorter period.

On April twentieth plaintiff wrote the defendant for shipping instructions for the steel scrap. On April twenty-fourth defendant wrote the plaintiff that it had sent the shipping instructions to Elmira, and said in the letter as follows: "We must impress upon you the necessity of making prompt shipment of the heavy melting steel purchased, as conditions are very uncertain, and if our parties cancel our contract we shall, of necessity, be compelled to cancel yours. We merely



emphasize this matter in order that you should understand the importance of getting the material moved." On April twenty-seventh the plaintiff replied to the last letter saying: "Replying to yours of the 24th inst., shipment of steel will all go forward next week." The following week expired on May sixth. Instead of keeping his promise to ship all the steel on or before that date the plaintiff, as already stated, only shipped two carloads, one on May third and one on May fifth. On May sixth the defendant's vendee in Buffalo canceled its contract with the defendant because of slow delivery. On May eighth defendant wired the plaintiff: "Stop immediately steel shipments and advise numbers cars being loaded." On the same day the defendant followed this telegram with a letter confirming the same and stating that its vendee had canceled its contract with the defendant. On receipt of the telegram on May eighth plaintiff wrote the defendant as follows: "Your message stopping shipments of steel scrap received, no cars are being loaded just at present expected to resume loading Wednesday next. Kindly advise resumption as soon as possible." On May thirteenth the defendant wrote the plaintiff definitely rescinding the contract. It seems quite clear from the foregoing facts that the default was on the part of the plaintiff. It is true that three days before the expiration of the time within which he had a right to make delivery, the defendant directed him to stop shipments and if this direction in the slightest degree influenced the plaintiff's conduct or interfered with the shipments in such a way as to prevent complete delivery by May eleventh, then the defendant and not the plaintiff is responsible for such failure. But it conclusively appears that when the defendant sent its telegram on May eighth stopping shipment the situation was such by reason of the plaintiff's delay prior to that time that he could not complete the delivery on May eleventh, and did not intend to do so. On May eighth in answer to defendant's telegram stopping the shipment, plaintiff wrote it that no cars were then being loaded and that he expected to resume loading on the following Wednesday, which would be May tenth. He testified that there was a balance undelivered of about 200 tons and that he could easily load one carload a day. The carloads which he had

shipped each contained about 28 tons. As he had about 200 tons undelivered and could load about 28 tons a day and "expected to resume loading Wednesday next" which would have been May tenth, it is entirely clear that he did not intend to complete his contract by May eleventh, and that he could not do so, and the same reasoning makes it equally clear that he could easily have performed his contract within much less time than thirty days. In fact the plaintiff expressly testifies that the entire amount of steel scrap could have been loaded in "about ten to twelve days." In no way does the defendant appear to have been responsible for any delay. On the contrary, as early as April twenty-fourth it impressed the plaintiff with the necessity of making prompt delivery, reminding him of the possibility that its vendee might cancel its contract. The circumstances do not indicate any delinquency or default on the part of the defendant nor any waiver by it of the time within which it was the duty of the plaintiff to make complete delivery. The plaintiff offers as an excuse for his unjustifiable delay the condition of Rubin's yard from which the steel scrap was to be removed, and the occurrence of certain holidays when the work could not proceed. But these explanations of the delay are not persuasive. On his own testimony the plaintiff is guilty of an inexcusable breach of contract.

The trial justice properly held the defendant liable for the purchase price of the carload of steel scrap which was shipped May fifth, and for which the defendant has not paid (Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 125, subd. 1, as added by Laws of 1911, chap. 571), and for damages for not accepting the annealing pots. Those were duly tendered by the plaintiff and refused by the defendant, probably for the reason that it considered that the plaintiff's breach of contract in respect to the steel scrap constituted a sufficient reason for the rejection of the annealing pots. But the contracts are separate and each must be considered without reference to the other.

The defendant alleges a counterclaim because of the plaintiff's failure to deliver the steel scrap. It had resold the same with reference to the plaintiff's contract as the latter well knew and the vendee of defendant rescinded the contract

with the latter because of delayed shipments by plaintiff under his contract. The defendant proved that its loss of profits on this resale was \$134, and it follows from what has been said that it is entitled to recover this amount against the plaintiff.

The judgment should, therefore, be modified by deducting therefrom the items of \$504 and \$134, with the appropriate interest.

Judgment modified by deducting therefrom \$638, with interest, and as so modified unanimously affirmed, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. EDWARD L. HEWSON, Defendant.

Third Department, December 28, 1917.

**Public Health Law — advertisement by dentist constituting practice of dentistry within meaning of statute — practice under false or assumed name — penalty — constitutional law — police power.**

A duly licensed and registered dental practitioner caused to be printed in a public newspaper on three separate days an advertisement as follows: "Roofless, Gumless, Plate is an exclusive feature of King dentistry. This natural, convenient and everlastingly comfortable plate cannot be had elsewhere. Ask for a free demonstration of its merits. It cannot drop, rock nor come loose. Absolutely invisible." And then appeared in large type the words "Dr. Hewson's (King) Dental Prices," followed by the advertised prices for various services in small type, and further on in the advertisement appeared the following: "Dr. E. L. Hewson's Dental Offices, formerly King Dental Offices, 50 Court Street," the words "King Dental Offices" being in much larger type than the rest of the sentence.

*Held*, that such advertisements constitute the practice of dentistry within the meaning of the Public Health Law, section 190, as amended by chapter 129 of the Laws of 1916, and such practice will be deemed to have been conducted under a false, assumed or trade name in violation of section 203 of the Public Health Law, as amended by chapter 129 of the Laws of 1916, and chapter 507 of the Laws of 1917, rendering said dentist liable to a penalty of \$100 for each violation.

This provision of the Public Health Law is a valid exercise of the police power and became binding on said dentist even though it made that unlawful which before was lawful.

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SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Merton E. Lewis, Attorney-General [Edward G. Griffin, Deputy Attorney-General, of counsel], for the plaintiff.*

*H. J. Hennessey, for the defendant.*

COCHRANE, J.:

Section 203 of the Public Health Law (Consol. Laws, chap. 45; Laws of 1909, chap. 49), as amended by chapter 129 of the Laws of 1916, which amendment became effective September first of that year, in paragraph 4 of subdivision B of the section makes a person guilty of a misdemeanor who "shall practice dentistry under a false or assumed name, or under the license of registration of another person of the same name, or under the name of a corporation, company, association, parlor or trade name." Subdivision D of said section 203, as amended by chapter 507 of the Laws of 1917, effective May sixteenth of that year, makes any person violating any of the provisions of the law relative to the practice of dentistry subject to a penalty of \$100 for each violation and declares that each act constituting a violation shall be deemed a separate act and the person guilty thereof shall be subject to a penalty of \$100 for each such act.

On three separate days in the month of July, 1917, the defendant, who was a duly licensed and registered dental practitioner in Binghamton, N. Y., caused to be printed in one of the public newspapers of that city an advertisement, the first part of which was as follows: "Roofless, Gumless, Plate is an exclusive feature of King dentistry. This natural, convenient and everlastingly comfortable plate cannot be had elsewhere. Ask for a free demonstration of its merits. It cannot drop, rock nor come loose. Absolutely invisible." Then appears in large type the words "Dr. Hewson's (King) Dental Prices," followed by the advertised prices for various services in small type. Further on in the advertisement appears the following: "Dr. E. L. Hewson's Dental Offices, formerly King Dental Offices, 50 Court Street," the words "King Dental Offices" being in much larger type than the rest of the sentence. The advertisement contains other

matters immaterial to this discussion except that the name of Dr. Hewson frequently appears therein. It is claimed by the plaintiff that the defendant became liable to a penalty of \$100 for each of the three publications of the said advertisement.

Section 190 of the Public Health Law, as amended by said chapter 129 of the Laws of 1916, defines the practice of dentistry as follows: "A person practices dentistry within the meaning of this article, who holds himself out as being able to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, alveolar process, gums, or jaws, and who shall either offer or undertake by any means or method to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the same." By the advertisement in question the defendant undoubtedly comes within the description of a person in the above definition "who holds himself out as being able to diagnose, treat, operate, or prescribe for \* \* \* and who shall either offer or undertake by any means or method to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition" of the teeth, gums or jaws. And to emphasize the purpose of the advertisement the agreed statement of facts declares that the defendant thereby "intended to hold himself out \* \* \* and to offer or undertake" to do the specific things which are enumerated in said section 190 as amended. So that there is no question but that the advertisements constituted the practice of dentistry within the meaning of the statute, and the remaining question is whether such practice was conducted under a false or assumed or parlor or trade name.

As bearing on the latter question the following facts which appear in the submission are significant: "That previous to September 1, 1916, and for a period of more than ten years prior thereto, the defendant has been conducting offices wherein dentistry was legally practiced under the name of 'King Dental Offices;' that the defendant's bill heads, literature and advertisements during said period, were all under the name of 'King Dental Offices' and the public had learned, from the said advertisements, to know the offices conducted by

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the defendant as ' King Dental Offices.' That the defendant acquired the name ' King Dental Offices ' by buying out the business of one ' King ' who was formerly legally engaged in the practice of dentistry under the name of ' King Dental Offices;' that during said period of ten years or more, the defendant has given to various patients at said office a written guarantee as to the quality of his work, which guarantee by their [sic] terms are good for various periods ranging from two to ten years, and that the said written guarantees are stamped or printed at the bottom thereof ' King Dental Offices.' "

It thus appears that Dr. King had formerly been a legal dental practitioner with an established profession and that his offices came to be known in the community as " King Dental Offices " and that the defendant for ten years or more after buying out the business of Dr. King had conducted the profession of dentistry under the name " King Dental Offices." By the advertisement in question the defendant clearly intended to draw the attention of the public to the fact that in some way it was Dr. King or a person who had been known to conduct his profession under the style of " King Dental Offices," whose services and professional prestige and skill would serve patients at the place where the defendant was conducting his professional operations. The advertisement is so planned and arranged as to make that idea prominent. Although the name of Dr. Hewson frequently appears in the advertisement, with a single exception it is in small type, and in that exceptional instance it is coupled with the name of Dr. King in a manner which seems to me to fall directly within the prohibition of the statute. In large type and in a prominent form the names are coupled as follows: " Dr. Hewson's (King) Dental Prices," followed by prices for various services printed in much smaller type. This is equivalent to saying: " The following are the prices for dental services of Dr. Hewson (King)." It seems to me that this is clearly the use of a false, assumed or trade name within the meaning of the statute. Later on in the advertisement the words " King Dental Offices " appear in large type and striking form, and while those words are preceded by the words in small type " Dr. E. L. Hewson's Dental Offices, formerly,"

the apparent and manifest purpose is to create or perpetuate the idea that the profession of dentistry is being continued by "King Dental Offices" at the place where according to the agreed statement of facts the defendant for more than ten years had been conducting his profession under that name. The advertisement is quite lengthy and when considered in the light of the facts appearing from the stipulated submission it is clear that the casual reader would conclude that Dr. King or the King Dental Offices were being advertised instead of Dr. Hewson individually and apart from Dr. King or the King Dental Offices. The question is not how would a careful and close reader of the entire article view the advertisement, but how would it strike the casual reader. But even to a careful reader and a close observer, the expression "Dr. Hewson's (King) Dental Prices" would certainly be ambiguous and constitutes a statutory misuse of names. The purpose of the statute is that a dentist shall practice his profession on his own merits and not on the reputation of another dentist. This purpose is overcome by the methods adopted by the defendant. He sought to benefit by the reputation of Dr. King. When patients came to his office they had a right to know, and the statute intends that they should know, that he was the responsible proprietor, and that his professional skill and ability, unaided by that of any other person, should constitute the only guaranty for the professional treatment accorded to them. The use of Dr. King's name in the advertisement in close connection with the defendant's name and the use of the words "King Dental Offices" served no proper or legitimate purpose. It is not even suggested that they were necessary in order to locate the defendant's offices. The only effect was to advertise the defendant under a name other than his own. This the statute does not permit.

It does not aid the defendant that he formerly lawfully practiced dentistry under the name of "King Dental Offices." The statute was enacted in the exercise of the police power of the State for the benefit of the public. It is a part of the Public Health Law of the State and designed to improve the health, physical condition and welfare of the people of the State, and being a valid exercise of police power it became

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binding on the defendant even though it made that unlawful which before was lawful. (*Collins v. State*, 223 U. S. 288; *Dent v. West Virginia*, 129 id. 114.)

Judgment should be rendered in favor of the plaintiff for \$300, besides costs.

All concurred.

Judgment in favor of the plaintiff for \$300, besides costs.

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JENNETTE HAYES, Respondent, v. HUDSON RIVER TELEPHONE COMPANY, Appellant.

Third Department, December 28, 1917.

**Master and servant — negligence — writing under seal releasing master from liability — presumption that written instrument contains all of agreement between parties — evidence of prior parol agreement.**

Where an employee of a telephone company gave it a release under seal, in consideration of the sum of one dollar "and other valuable considerations received from said corporation," including several payments made by it and the delivery of receipts therefor "the receipt whereof is hereby acknowledged," and thereby released and forever discharged said company from all liability on account of personal injuries, an assignee of said employee, in a subsequent action for the breach of an alleged prior parol agreement by the company to give said employee a life job at such work as he was able to do, is not entitled to show the parol agreement, as it would be in violation of the rule which excludes evidence of an oral agreement in contradiction of a written instrument, especially since there is no evidence as to said parol agreement, except that given by the employee which is contradicted by the general superintendent of the company.

Where a contract indicates an intention to express the whole agreement between the parties and is consummated by writing, a presumption of law arises that it contains the whole of the agreement.

Evidence examined, and held, insufficient to sustain the burden of proof which was upon the plaintiff to establish the parol agreement.

APPEAL by the defendant, Hudson River Telephone Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of



Albany on the 18th day of June, 1917, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 20th day of June, 1917, denying defendant's motion for a new trial made upon the minutes.

*John A. Delehanty*, for the appellant.

*Walter A. Fullerton*, for the respondent.

SEWELL, J.:

The plaintiff's assignor, Claude S. Hayes, was injured on the 24th day of September, 1903, while in the employ of the defendant by falling from a telephone pole. On the 16th day of July, 1904, he gave the defendant a release under seal. This instrument after reciting the injury, the expenses incurred for medical and surgical attendance, the payment by the defendant of the wages of the employee during the time he was unable to work and an agreement on the part of the defendant to pay the bills and charges therein mentioned, stated that "In consideration of the sum of one dollar (\$1.00), lawful money of the United States of America, to the said Claude S. Hayes in hand paid by said Hudson River Telephone Company, and other valuable considerations received from said corporation by said Claude S. Hayes including the several payments made by said corporation, as above set forth, and the delivery of the receipts therefor to the said Claude S. Hayes, the receipt whereof is hereby acknowledged," said Claude S. Hayes "hath remised, released and forever discharged and By These Presents doth, for himself and \* \* \* assigns, remise, release and forever discharge the said Hudson River Telephone Company and its successors and assigns, of and from all \* \* \* actions, cause and causes of action, \* \* \* debts, \* \* \* covenants, contracts, damages, \* \* \* claims and demands whatsoever," which he then or might have had against the defendant by reason of any matter or thing, "and particularly by reason of any alleged injury, damage or loss sustained, or claimed to have been sustained, by said party of the first part on account of the accident which occurred on or about the 24th day of September." The plaintiff alleges in her complaint that on the 14th day of March, 1904, Claude S. Hayes and the

defendant entered into an agreement to the effect that Hayes waived his cause of action against the defendant for damages suffered and to be suffered by him on account of his injuries and the defendant agreed to pay all necessary expenses of treating him for his injuries, to pay him nine dollars a week until such time as he was able to go to work and then to give him a life job at such work as he was able to do and to pay him the prevailing rate of wages for such employment.

This action was brought to recover damages for an alleged breach of this agreement, the plaintiff claiming that the defendant broke it by discharging Claude S. Hayes and refusing to give him a life job at such work as he was able to do, and that the cause of action for damages was duly assigned to her.

The chief controversy at the trial centered around the question whether this oral agreement was made. Claude S. Hayes was the only witness sworn by plaintiff as to this agreement. He testified that he called on Mr. Greenleaf, the general superintendent of the defendant, Monday, March 14, 1904, and told him that he had received a notice from Mr. Davis, the district manager, that his pay would be stopped, and "Mr. Greenleaf says that there must have been a misunderstanding between Mr. Davis and Mr. Hawley because that he didn't know the reason why my pay should be stopped. I was on crutches. I showed Mr. Greenleaf my condition and I told him that I did not want to have any trouble with the corporation, but I thought at this time it would be necessary for us to make a settlement, and Mr. Greenleaf \* \* \* asked me if I was a married man. I said that I was not. I told him I was living with my folks. Well, he said that the company had paid me my wages up to that time that they stopped me, why it was about two weeks previous to that, and if I would receive nine dollars a week and they pay my expenses and when I was able to go to work they would furnish me with work that I could do, for life, with wages accordingly, if it would be satisfactory agreement, which I said it was, as I did not care to have any trouble with the corporation. That closed our conversation and I went home."

There was not a particle of evidence, except this that tended to show that any parol agreement was made, and that

no such agreement was made at that time or any other was testified to by Greenleaf.

I think that it was not admissible to show the prior parol agreement; that the admission of that evidence was in violation of the elementary rule which excludes evidence of an oral agreement in contradiction of a written instrument; in this case, one under seal. There is no force in the contention that the parol agreement could be proved as a part of the consideration for the release or as explanatory of the expression "other valuable considerations received from said corporation."

To engraft a new agreement upon the release by which the defendant was to further compensate the employee for his injury would be to change and vary the terms of the written agreement in an essential particular. It would be an oral contradiction of the statement in the release that it was given and accepted in consideration of a valuable consideration that had been paid by the defendant, "the receipt whereof is hereby acknowledged."

It is apparent on the face of the instrument that it cannot be read as an agreement to make any further payment or as a future undertaking on the part of the defendant. On the contrary, it is obvious that it was intended to and did express the whole agreement between the parties. It is well settled that where a contract does indicate such intention and design, and is one consummated by writing, the presumption of law arises that the written instrument contains the whole of the agreement and there can be no question but that the parties intended the writing as a repository of the agreement itself. (*Eighmie v. Taylor*, 98 N. Y. 288; *Smith v. Dotterweich*, 200 id. 299.)

I think there can be no doubt that the release is within the protection of the rule and must be conclusively presumed to contain all that was agreed to. If, however, it be assumed that the agreement between the parties is not to be ascertained exclusively by the written instrument, and that it was admissible to add to or vary it by testimony tending to show a prior parol agreement, I am of the opinion that there is not sufficient evidence in the case to sustain the verdict. The burden was upon the plaintiff to establish the agreement.

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The evidence of the only witness who testified to that fact is not in any way corroborated and is flatly contradicted by the other alleged party to the agreement. It is also contradicted by the written release, the contents of which, as before observed, are absolutely inconsistent with the plaintiff's claim with respect to the agreement. It follows that the judgment and order appealed from should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred; COCHRANE, J., in result.

Judgment and order reversed on the law and facts and new trial granted, with costs to appellant to abide event. The court disapproves of the finding of fact that there was any agreement outside of the written agreement.

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MARTIN S. LYNCH, Appellant, v. BENN CONGER and Others,  
Respondents, Impleaded with CLARENCE S. MALLERY,  
Defendant.

Third Department, December 28, 1917.

**Equitable assignment — agreement by bridge company to pay attorney from moneys due under contract — liability of president and director of company for converting money equitably assigned.**

Where a bridge company retained an attorney to aid it in the procuring and execution of a contract with the city of New York, and agreed that said attorney should receive a certain sum for his services out of the final payment by the city, and after said attorney had furnished all the services required by the company, its president promised and agreed to notify him when the city would be ready to pay the final estimate, and later the bridge company and its president agreed that said attorney was entitled to and should receive his share of the final estimate and that a separate check should be given him therefor by the city, and thereafter, without notice to said attorney, the president of the bridge company notified a director to draw the entire amount due from the city and this was done and the proceeds deposited to the credit of the bridge company and used in the payment of its debts, among which was a debt to a partnership of which the president of the bridge company was a member, said agreement between the attorney and the bridge company operated as an equitable assignment to the attorney and the president and director of said company incurred a personal liability when they converted the amount due the attorney to their own use.

Any writing, words or act which indicate the intent of the assignor to make appropriation of a fund or a part of it and from which an assent by the assignee to receive may be inferred, will, in equity be enforced as an assignment if sustained by a sufficient consideration.

APPEAL by the plaintiff, Martin S. Lynch, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Tioga on the 29th day of August, 1917, dismissing the complaint upon the decision of the court after a trial before the court without a jury.

The facts found by the trial court, which are important to the consideration of the questions of law involved, are that the plaintiff was an attorney and counselor at law; that sometime during the year 1912 the Owego Bridge Company, a domestic corporation, of which the defendant Willis N. Conger was president and the defendant Benn Conger a director, was awarded a contract to furnish the material and erect all the steel to be used in the construction of an armory in the city of New York for the sum of \$532,000; that during the negotiations leading up to the making of the contract the plaintiff performed services and gave advice and counsel, as attorney at law, to the bridge company, its officers and general manager, pertaining to the contract and the methods to be employed in obtaining an award; that after the award was made, and before the contract was actually delivered, the Owego Bridge Company, through its proper officers, hired and retained the plaintiff as its attorney and counselor to act for it, to advise and counsel it, and to furnish all services thereafter required of him, as attorney and counselor at law, in and about the execution of the contract and the fulfillment of the duties of the bridge company until the contract should be fully completed; that it was agreed between the plaintiff and the defendant that the amount and value of plaintiff's services to that date, and to be thereafter rendered as such attorney and counselor at law, should be \$5,000, and "that the plaintiff should receive out of the funds to be paid by the city of New York in and by the final estimate or final payment, the sum of five thousand dollars;" that prior to June 16, 1914, the plaintiff had furnished all the services required by the defendant and had in all respects fulfilled his contract, and the sum of \$5,000 was then fully earned;

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that sometime prior to the 17th day of June, 1916, Willis N. Conger, the president of the bridge company, "promised and agreed with the plaintiff to notify him of the date when the city of New York would be ready to pay over the final estimate of \$16,856.30, in order that the plaintiff might be present to receive his share of the said final estimate;" that on the 17th day of June, 1916, the armory was completed and the city of New York was ready and prepared to pay the sum of \$16,856.30 on the execution of the proper receipt therefor; that a conference was had on that day between the plaintiff, Willis N. Conger and the defendant Benn Conger; "that in said conference the Owego Bridge Company and the defendant, Willis N. Conger, agreed with the plaintiff that the plaintiff was entitled to and should receive his share of final estimate, and that he should receive from the city of New York a separate check for the amount of his said share;" that Benn Conger disputed the claim of the plaintiff and stated that he had paid about \$100,000 of the debts of the bridge company, and would agree to pay all that was due to the plaintiff after the same was adjusted, if plaintiff would permit the entire \$16,856.30 to be paid over to him by the city; that the plaintiff refused to accept this proposition, and it was then agreed between said parties that another conference should be had, and until such further conference should be had between the plaintiff, Willis N. Conger and Benn Conger, none of the funds should be drawn by any of the said parties, and in the meantime the fund should remain intact and in the hands of the city; that before the time appointed for the second conference and between the 25th and the 27th days of June, 1916, the defendant Benn Conger notified the defendant Willis N. Conger, by telegraph, to go to New York and draw the entire amount of \$16,856.30; that the defendant Willis N. Conger, pursuant to said direction, and without notice to or the knowledge of the plaintiff, obtained a check for the entire amount, caused the same to be collected and deposited the proceeds to the credit of the Owego Bridge Company; that on the following day he drew a check, as president of the bridge company, for the amount so deposited, payable to C. W. Conger & Co., a partnership of which Benn Conger and his brother, Jay Conger, were the only surviving

members, and caused it to be delivered to Benn Conger; that Benn Conger on the same day caused the check to be collected, paid \$7,164.97 of the proceeds upon a debt of the bridge company that had been guaranteed by C. W. Conger & Co., and applied the balance, \$9,691.33, upon an indebtedness of the bridge company to C. W. Conger & Co. It was also found that on June 17, 1916, the Owego Bridge Company was insolvent to the knowledge of Willis N. Conger and Benn Conger.

The court found, as conclusions of law, that the agreement between the plaintiff and the Owego Bridge Company did not operate as an equitable assignment or create an equitable lien upon the funds constituting the final estimate; that when the sum of \$16,856.30 passed to the Owego Bridge Company and from it to C. W. Conger & Co., it was not impressed with a trust in favor of the plaintiff; that the plaintiff had failed to establish a cause of action in equity and that the complaint should be dismissed.

*Martin S. Lynch* [*James S. Truman* of counsel], for the appellant.

*O. U. Kellogg*, for the respondents.

SEWELL, J.:

This is, in form, an action to determine that the plaintiff had an equitable lien on or ownership as equitable assignee of the funds constituting the final estimate to the extent of \$5,000 and to compel the defendants Willis N. Conger and Benn Conger to account and pay over to the plaintiff \$5,000, his proportional part of the fund taken and converted by them to their own use, with interest thereon.

We think that the facts found authorize the conclusion that the agreement between the plaintiff and the Owego Bridge Company operated as an equitable assignment to the plaintiff to the extent of \$5,000 of the fund of \$16,856.30, constituting the final payment to the Owego Bridge Company under its contract with the city of New York.

Were it not that the trial court held that they did not we would have hardly supposed such a conclusion susceptible of reasonable doubt.

The best authorities on the subject of equitable assignment

hold that no particular form of words is necessary; that any writing, words or act which indicate the intent of the assignor to make an appropriation of a fund, or a part of it, and from which an assent by the assignee to receive may be inferred, will, in equity, be enforced as an assignment, if sustained by a sufficient consideration.

It is unnecessary to refer to authorities for this general principle. It is to be observed that the language used in the present case does not show a mere executory agreement to pay a debt out of a designated fund, but a purpose, on the one hand, to set aside and transfer a fixed portion of a specific fund, in or to come into the hands of a third party, and an assent to receive it on the other. It shows an agreement to divide the fund into two parts, one of \$5,000, and one of the balance, and that the \$5,000 portion shall be paid to the plaintiff, not by the contractor, or out of the moneys to be received by it, but by the city itself.

That the parties understood that this was an actual application of the fund *pro tanto* and conferred a complete and present right on the plaintiff to that part, is apparent from the fact that after the agreement was made he was requested to consent to the payment of the whole amount to the contractor and refused.

We think this case is covered by the decision in *Williams v. Ingersoll* (89 N. Y. 508) where certain attorneys were employed to transact the legal business required in the prosecution of certain claims, under an agreement that they were to be paid for their services out of the money that should be obtained from the suits or proceedings, and should have a lien thereon for all sums that might be due for their services which lien should be superior to any rights the plaintiff might have, and it was held that the agreement operated as an equitable assignment to the attorneys of the moneys obtained, and that a notice to the debtors was not necessary to make the assignment valid.

In *Fairbanks v. Sargent* (117 N. Y. 329) Judge FINCH, speaking of an agreement of this character, said: "The contract was either a simple agreement for compensation to be enforced against Underwood, or it was an equitable assignment



of a definite share of the proceeds of the claim against Zabriskie. Obviously it is something more than and quite different from a mere agreement for compensation measured by results. That would have given to Fairbanks only a personal claim against Underwood, and scarcely served to induce on his part further services and expenses upon a credit already precarious; and not compensation in general, but a specific share in a specific fund or specific property was the exact and material point of the contract upon which the rights of both parties hinged. \* \* \* There could be no legal assignment of a fund not in existence or proceeds not realized, but equity treats them as if existing or realized, and the contract for their receipt by Fairbanks as an equitable assignment of the stipulated share to him, and, as a consequence, makes him the equitable assignee of so much of the debt or demand as is represented by his share of the proceeds. I think we have never failed to hold this doctrine on a similar state of facts. We discussed the subject somewhat in *Williams v. Ingersoll* (89 N. Y. 508), and there said: 'It is a rule in equity that anything which shows an intention to assign on the one side, and from which an assent to receive may be inferred on the other, will operate as an assignment if sustained by a sufficient consideration.' "

In *Holmes v. Evans* (129 N. Y. 140) the defendants entered into an agreement with plaintiffs by which they were to undertake the collection of certain claims and were to receive upon settlement or recovery a specified percentage of such recovery or settlement as their compensation. Judge ANDREWS stated the legal effect of the agreement in the following language: "This was not an agreement to pay the plaintiffs out of the fund to be recovered. It was an agreement in effect that they should have a share in the claims, and that when realized, the fund should be divided between the parties in the proportions indicated."

In *Harwood v. La Grange* (137 N. Y. 538) an attorney rendered services in an action under an agreement that he should receive his compensation out of the proceeds thereof, and the court said: "That the agreement gave the plaintiff an equitable lien on or ownership as equitable assignee in the proceeds of the action, is not open to doubt."

In each of these cases the facts were vastly weaker than those in the present case. We are, therefore, constrained to hold that the contract operated as an equitable assignment by the Owego Bridge Company to the plaintiff and, by it plaintiff became an equitable assignee of his stipulated share of the last payment. That being so, it must also be held that the defendants Willis N. Conger and Benn Conger incurred a personal liability when they converted it to their own use. In judgment of law the contract between the plaintiff and the bridge company created a trust for the benefit of the plaintiff, his portion of the payment constituting a trust fund set apart for his benefit. If the city of New York still had the money, no one would dispute that the plaintiff could maintain an action to get his share of it. It came into the hands of Willis N. Conger and Benn Conger impressed with the obligations of the trust, and they, without right or authority, with full knowledge of the right that the plaintiff had acquired, took the trust fund with the design of preventing him from obtaining it. The Owego Bridge Company is insolvent. Under these circumstances, it would be strange indeed if these defendants did not incur a personal liability for a breach of the trust. Having willfully and fraudulently violated a duty which equity and good conscience laid upon them, there is no good reason why the plaintiff may not recover of them the damages he has thereby sustained. It follows that the judgment appealed from should be reversed and a judgment entered in favor of the plaintiff and against the defendants Willis N. Conger and Benn Conger for \$5,000, with interest thereon from the 27th day of June, 1916, with costs against them in this court and in the court below.

All concurred.

Judgment reversed and judgment directed in favor of the plaintiff and against the defendants Benn Conger and Willis N. Conger for \$5,000, with interest thereon from the 27th day of June, 1916, with costs against them in this court and the court below.

ANN L. DAVIS, as Executrix, etc., of EARL DAVIS, Deceased,  
Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON  
RIVER RAILROAD COMPANY, Appellant.

Fourth Department, December 5, 1917.

**Negligence — action by executrix and sole legatee to recover for death caused by negligence — when proceeds of action belong to widow — agreement by executrix to pay attorney half of recovery — attorney's compensation measured by amount of settlement — action should not continue after settlement to fix amount of attorney's compensation.**

Where a person killed by negligence bequeathed all his property to his mother, although he had a wife living, and the mother, as executrix, brought an action to recover for the testator's death, the widow, being the sole beneficiary of the right of action, had power to settle the same with the defendant and the executrix is only entitled to the sum necessary to protect her for funeral expenses paid and for her liability to her attorney for services in the action.

When the executrix entered into a contract with her attorney to pay him half of any recovery or settlement as compensation for his services, the amount of his compensation should be based upon the amount paid to the widow on the settlement of the action although, in spite of the settlement, the court erroneously allowed the trial to proceed which resulted in a verdict much larger than the amount of the settlement.

KRUSE, P. J., dissented.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oswego on the 14th day of September, 1914, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

The verdict and interest was later reduced by the court to \$1,761.50.

Also an appeal by the defendant from a decree or order of the Surrogate's Court of the county of Oswego, entered in the office of said Surrogate's Court on the 18th day of July, 1914, fixing and determining the amount which plaintiff should be permitted to pay to her attorney in this action as com-

pensation for his services and expenses at \$1,620.50, besides taxable costs.

Earl Davis, plaintiff's testator, was in the employ of defendant as a carpenter. On March 15, 1913, he was engaged, with other employees of defendant in the erection of an icehouse upon defendant's property in the city of Oswego. The structure when only partly erected was blown down by a high wind and Davis was killed.

He left a will, which was duly probated, and letters testamentary issued to the plaintiff, his mother. By the will his property was all left to his mother. He left a widow, with whom he had not been living for some time, and no children or descendants.

Plaintiff brought this action to recover the damages sustained by the widow and his estate on account of the death of Davis, alleging that it was caused by the negligence of the defendant. The action was begun in October, 1913. In May, 1913, plaintiff made a written contract with her attorney by which he agreed to commence and prosecute this action, and in consideration of his agreement to make no charge for his services unless successful, she agreed to pay him one-third of the amount received in case the claim was settled without trial, and fifty per cent of the amount received in case of trial, whether compromised thereafter or not, in addition to taxable costs.

The defendant served an answer on November 28, 1913, putting in issue the material allegations of the complaint, and on December 26, 1913, the defendant made a settlement with Nettie S. Davis, the widow, paying her \$400 and receiving from her a written release of defendant from all liability for damages sustained by her as widow and sole beneficiary of said Davis by reason of his death, and on April 16, 1914, the defendant served a supplemental answer by leave of the court setting up this settlement and release as a further defense to the action.

The case came to trial on May 21, 1914, and notwithstanding the objection of defendant's counsel the trial proceeded as if no settlement had been made. In the course of the trial and after defendant had put in evidence the release, the court, in the absence of the jury, took proof of the contract between

the plaintiff and her attorney, and of the amount of the funeral expenses which plaintiff had paid, over defendant's objection and exception. Thereupon the jury was recalled and the case submitted to them, without disclosing to them the evidence taken by the court in their absence.

The jury rendered a verdict for the plaintiff of \$3,000. Defendant's counsel thereupon moved to set aside the verdict and for a new trial under section 999 of the Code, whereupon the court stated that all motions would be reserved until the Special Term to be held at Oswego on July 18, 1914.

On June 11, 1914, plaintiff petitioned the surrogate of Oswego county to determine and allow the amount of the funeral expenses and the amount of her attorney's lien and fees, disbursements and expenses of the action, so that the same might be deducted from said \$3,000 verdict. Whereupon the widow and the defendant were cited before the surrogate, where testimony was taken and a hearing had, and on July 17, 1914, the surrogate made an order or decree fixing, auditing and allowing \$141 for the funeral expenses paid by the plaintiff, and \$1,620.50, besides taxable costs, being one-half the verdict and interest thereon, for the fees and services of plaintiff's attorney in the prosecution of the action, and also fixing, auditing and allowing to the plaintiff \$61.98 as her legal commissions as executrix on the amount of said verdict and interest thereon.

Thereupon, and on July 18, 1914, at a Special Term held in Oswego, the justice who had presided at said trial received proof of the above-mentioned decree of the surrogate, and made an order reciting that defendant had moved to set aside said verdict and to grant a new trial, denying such motion and directing that the verdict of \$3,000, rendered by the jury, and interest thereon, be reduced to the sum of \$1,761.50, and that judgment for that amount, with taxable costs, be entered upon the verdict; thereby allowing plaintiff the amount so allowed by the surrogate except the \$61.98, the fees of the plaintiff as executrix, which the trial court was of opinion should not be allowed. Judgment was thereupon entered in favor of the plaintiff in accordance with this order, and defendant has appealed from the judgment and the order and also from the decree and order of the surrogate.

*Purcell, Cullen & Purcell* [*Francis E. Cullen* of counsel], for the appellant.

*Freelon J. Davis* [*Udelle Bartlett* of counsel], for the respondent.

PER CURIAM:

In view of the settlement between defendant and the widow who is the sole beneficiary of the right of action, the good faith of which was not questioned, the learned trial judge was clearly right in holding that there could be no recovery beyond the amount necessary to protect plaintiff against loss for the funeral expenses she had paid and her liability to her attorney for his services in the action. As to the latter, both plaintiff and her attorney stood upon the written contract between them as fixing the amount of the attorney's compensation.

We are of opinion that the \$400 paid by defendant in settlement is the amount received upon the plaintiff's claim within the intent and meaning of the contract with the attorney, and that the attorney's right to compensation is, therefore, limited to not more than fifty per cent of \$400, and the taxable costs.

Since the settlement was not attacked for fraud or as collusive, we think it was error to submit the question of the amount of damages to the jury for the sole purpose of permitting a recovery of one-half the amount of such verdict to satisfy the attorney's contract.

The judgment and order should be modified so as to reduce the amount of plaintiff's recovery to \$200, and interest from December 26, 1913, for the attorney's compensation, together with the costs as taxed, and \$141 for funeral expenses, and as so modified affirmed, without costs of this appeal to either party. The decree of the surrogate should be modified so as to fix the attorney's fees and expenses at \$200, and interest from December 26, 1913, in place of \$1,620.50, and as modified affirmed, without costs of this appeal to either party.

All concurred, except KRUSE, P. J., who dissented and voted for affirmance.

Judgment and order modified so as to reduce the amount of the plaintiff's recovery to \$200, and interest from December 26, 1913, for the attorney's compensation, together with the costs as taxed, and \$141 for funeral expenses, and as so modified affirmed, without costs of this appeal to either party. The decree of the Surrogate's Court is modified so as to fix the attorney's fees and expenses at \$200, and interest from December 26, 1913, in place of \$1,620.50, and as so modified affirmed, without costs of this appeal to either party.

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FRANK M. ADAMS, Appellant, v. LLOYD GARRISON LUCE and MARY E. LUCE, Respondents.

Fourth Department, December 5, 1917.

**Assignment — transfer of plaintiff's estate procured by undue influence — transfers set aside.**

Suit to set aside transfers which divested the plaintiff of practically all his property and estate to the exclusion of an adopted child. Evidence examined, and *held*, that the transfers were made at a time when the transferor was in such a weak condition of mind and body that he was unconscious of the nature of his acts, which were the result of undue influence exerted by the defendants, and that the transfers should be set aside.

FOOTE, J., dissented.

APPEAL by the plaintiff, Frank M. Adams, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Chautauqua on the 26th day of April, 1917, dismissing the complaint on the merits upon a decision of the court after a trial before the court at the Chautauqua Special Term.

*Thomas P. Heffernan* [*Nugent & Heffernan*, attorneys], for the appellant.

*William S. Stearns* [*H. A. Clark*, attorney], for the respondents.

PER CURIAM:

An examination of the evidence leads us to the conviction that the finding of the learned trial court that the several instruments whereby it is claimed plaintiff transferred to defendants practically all his property and estate, almost

to the entire exclusion of his little adopted daughter, were his free, unrestrained and unrestricted acts, and done with full knowledge of the purport thereof, was clearly against the weight of the evidence. At the time of the alleged execution of said papers plaintiff was and for a considerable period prior thereto had been in a very much enfeebled condition of mind and body and fell an easy prey to the designs of those of stronger mentality who surrounded him. His lack of concern for his dying wife for whom he had always borne a deep affection, his refusal to visit her during her last hours, or to attend the funeral, although at the time he was living in the same house, was dressed and physically able to do so, and the many other evidences of his dazed, incoherent and dependent condition just preceding and at the time of the execution of the alleged transfers leads us to the belief that he had no intelligent appreciation of his acts. Transactions of the sort attempted to be upheld here should always be closely scrutinized and never permitted to stand unless it clearly appears that the grantor was fairly conscious of his acts and of sufficient mentality to be beyond any possible influence by stronger minds. (*Allen v. La Vaud*, 213 N. Y. 322; *Rosevear v. Sullivan*, 47 App. Div. 421; *Hunter v. McCammon*, 119 id. 326.)

That plaintiff at the time of the execution of the several transfers here was in a weak condition of mind and body and unconscious of the nature of his acts; that such execution was procured by undue influence exerted upon him by defendants, seems fairly established by the evidence. The finding of the learned trial court to the contrary is in our opinion against the weight of the evidence. The findings sustaining such transactions should be disapproved and in place thereof, appropriate findings should be made granting plaintiff the relief which he seeks in this action.

All concurred, except FOOTE, J., who dissented and voted for affirmance; LAMBERT, J., not sitting.

Judgment reversed, with costs, and judgment directed for the plaintiff, with costs. Order to be settled before Mr. Justice MERRELL on two days' notice at which time findings to be disapproved and proposed new findings may be submitted.



WALTER KOZLOWSKI, Respondent, v. MARY K. GOMOLSKI,  
Appellant, Impleaded with JOHN GOMOLSKI, Defendant.

Fourth Department, December 5, 1917.

**Costs — action against joint tort feors — effect of nonsuit as to one defendant — implied severance of action — when defendant entitled to costs although plaintiff has judgment against codefendant.**

Where a husband and wife were sued jointly in an action for libel and a verdict was rendered against the husband, but a nonsuit was directed in favor of the wife, there was in effect a determination that the wife was not a tort feor but was a stranger to the transaction for which her husband was sued.

Hence, where she did not join in her husband's answer and was not united in interest with him in the subject-matter of the action, she is entitled to a judgment for costs, as the nonsuit as to her was in effect a severance of the action under sections 1204 and 1205 of the Code of Civil Procedure, which entitles her to costs.

The mere fact that the wife appeared by the same attorney as her husband does not deprive her of the right to costs.

APPEAL by the defendant, Mary K. Gomolski, from an order of the Supreme Court, made at the Oneida Trial Term and entered in the office of the clerk of the county of Oneida on the 17th day of November, 1916, vacating and annulling a judgment herein in her favor.

*Timothy Curtin*, for the appellant.

*W. S. Mackie*, for the respondent.

KRUSE, P. J.:

The appellant and her husband were sued jointly in an action for libel. A verdict was rendered against the husband, but a nonsuit was directed in favor of the appellant. A separate judgment was entered in her favor dismissing the complaint, with costs. The judgment was set aside upon the ground that she was not entitled to costs, as of course, and the court had not exercised its discretion to that effect in her favor. Section 3229 of the Code of Civil Procedure provides: "The defendant is entitled to costs, of course, upon the rendering of final judgment, in an action specified in the last section, unless the plaintiff is entitled to costs,

as therein prescribed. But where, in such an action against two or more defendants, the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs, of course. In that case, costs may be awarded, in the discretion of the court, to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in an answer, and was not united in interest, with a defendant, against whom the plaintiff is entitled to costs." This section is the same as section 306 of the former Code of Procedure, as amended by chapter 479 of the Laws of 1851. Under this amendment, the Court of Appeals held in *Allis v. Wheeler* (56 N. Y. 50), which was an action against a maker and indorser of a promissory note where both joined in one answer and the plaintiff recovered against but one, that the successful defendant was not entitled to costs as a matter of course, but that decision I think is not an authority for this order. While joint tort feors may be sued jointly or separately the nonsuit established that she was not a tort feor at all. She was an entire stranger to the transaction for which her husband was sued. She did not join in his answer and was not united in interest with him in the subject-matter of the action.

Under sections 1204 and 1205 of the Code of Civil Procedure, a judgment may be given for or against one or more plaintiffs or one or more defendants and where the action is against two or more defendants and a several judgment is proper, the court may in its discretion render judgment, or require the plaintiff to take judgment against one or more of the defendants and direct that the action be severed and proceed against the others as the only defendants therein. I think here the action may be regarded as having been severed, although no formal order to that effect was made. A like conclusion was reached by the First Department in *Tanzer v. Breen* (131 App. Div. 655) in a similar case, and followed in *Furst v. Moskowitz* (169 id. 940) and *Heiden v. City of New York* (173 id. 891).

The mere fact that the appellant appeared by the same attorney as her husband does not deprive her of costs. (*Ingeman v. Snare & Triest Company*, 158 App. Div. 915.) If the appellant had joined in the answer with her husband,

a different question would be presented. (*Schuller v. Robison*, 139 App. Div. 97.)

The order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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In the Matter of the Application of NATIONAL STONEMEAL COMPANY, Appellant, for a Writ of Mandamus against CHARLES S. WILSON, Commissioner of Agriculture of the State of New York, Respondent.

Third Department, December 28, 1917.

**Agricultural Law — application of manufacturer of fertilizer for certificate under Agricultural Law, section 222 — mandamus — moving papers not showing right to certificate — when alternative writ may be granted.**

A manufacturer of a fertilizer known as "stonemeal" is not entitled to a writ of mandamus requiring the Commissioner of Agriculture to issue a certificate under section 222 of the Agricultural Law, where the moving papers are absolutely silent upon the question as to whether or not the material will enrich the soil, and the opposing affidavits tend strongly to show that it is not an efficient factor in the production of crops.

However, if the record had disclosed a question of fact as to the fertilizing value of the material, the manufacturer thereof would have been entitled to an alternative writ of mandamus to have that fact determined.

APPEAL by the petitioner, National Stonemeal Company, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 4th day of May, 1917, denying its application for a peremptory writ of mandamus.

The appellant manufactures an article to be used as a fertilizer known as "stonemeal." It claims to have complied with the requirements of sections 220 and 222 of the Agricultural Law and has demanded of the Commissioner of Agriculture the certificate provided by section 222. (See

Consol. Laws, chap. 1 [Laws of 1909, chap. 9], §§ 220, 222, as amd. by Laws of 1910, chap. 435, and Laws of 1915, chap. 72. Since amd. by Laws of 1917, chap. 342.) The Commissioner refuses the certificate because in his opinion "stonemeal" does not possess the qualities to make it a "fertilizer" and cannot in any just or proper sense be characterized as such. The appellant asks for a peremptory writ of mandamus requiring the Commissioner to issue such certificate.

*Brown & Brown* [Oscar J. Brown of counsel], for the appellant.

*Merton E. Lewis*, Attorney-General [Charles M. Stern, Deputy Attorney-General, of counsel], for the respondent.

COCHRANE, J.:

The application was properly denied because there is nothing in the moving papers indicating that "stonemeal" possesses any fertilizing value. The statute makes no attempt to define or describe a "fertilizer." Undoubtedly it is not the duty of the Commissioner to discriminate between different materials to be used as fertilizers, or to withhold his certificate because in his opinion a material offered for sale as a fertilizer is not as good as some others which may be upon the market. If an article possesses any substantial fertilizing value, the manufacturer or seller thereof on complying with the statute is entitled to receive from the Commissioner his certificate "setting forth said facts." But it is clear that in some way the material in question should enrich the soil or aid in the production of crops. The moving papers are absolutely silent on this point. The chemical constituents of "stonemeal" are stated but to the mind of an ordinary person not possessing the requisite technical and scientific knowledge this statement means nothing as to the merits of the material as a fertilizing agency in assisting in the growth or production of a crop or in making the soil more rich or productive. The opposing affidavits on the other hand tend strongly to show that "stonemeal" is not an efficient factor in the production of crops. Unless it has some value as a productive agency the statement required by the statute and which has been filed with the Commissioner of Agriculture is

deceptive and misleading and the Commissioner is clearly not justified in giving official recognition to a deception. If the record disclosed a question of fact as to the fertilizing value of "stonemeal" the appellant would be entitled to an alternative writ of mandamus to have that fact determined. As heretofore stated the record discloses no such question.

The order should be affirmed, with costs.

All concurred, except KELLOGG, P. J., voting for dismissal of appeal in memorandum.

KELLOGG, P. J. (for dismissal of the appeal):

If the Special Term rightly construes the statute (See 99 Misc. Rep. 664), the relator's product is not within the statutory contemplation and, therefore, may be sold without license. The statute relates to the sale or offering for sale of "any commercial fertilizer, or any material to be used as a fertilizer." The statute was made to protect the public against inferior or worthless fertilizers, and required only that the component parts of the product be made clear to the public and the public authorities. It caused the purchaser to be informed of just what the product was, and left him to buy it or not as he might choose.

The Commissioner had no discretion. Section 222 of the Agricultural Law provides that when the fee is paid the applicants "shall be entitled to receive a certificate from the Commissioner of Agriculture setting forth said facts." The only requirement was that an application should be made which should truly state the component parts of the product as directed. The duty of the Commissioner was to see that the petition was in form and complied with the statutory requirement, and that the fee was paid, and thereupon he must issue the certificate.

If this is not the correct interpretation of the statute, then the absolutely worthless article has a decided advantage over one which has real merit. In my judgment it was immaterial whether the product was in fact a fertilizer or not; if it was to be sold "to be used as a fertilizer" without regard to its qualities, the certificate was necessary. I think, therefore, that at the time of the hearing the relator was entitled to the certificate.

Section 222 was amended by chapter 342 of the Laws of 1917 by adding to it the provision: "but no such certificate shall be issued for the sale of a brand of commercial fertilizer or material to be used as a fertilizer under a brand or trade name, or with any information or statement accompanying same, which is misleading or deceptive or tends to mislead or deceive as to its quality or the constituents or materials of which it is composed."

The answering affidavits indicate that the appellant's article was without merit as a fertilizer and, therefore, selling it with the information or statement that it was a fertilizer, or to be used as a fertilizer, was misleading and tended to deceive and, upon the facts shown, a certificate cannot now issue. The amendment, in itself, is not retroactive. The only relief sought by the appellant is a reversal of the order and a determination that the certificate issue; but under the amendment such a certificate cannot now issue in this case. Therefore, the question whether the Commissioner rightly or wrongly decided the application is purely academic, and the appeal should be dismissed.

Order affirmed, with costs.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of MARION I. WINKLER, Adopted Daughter, Respondent, for Compensation under the Workmen's Compensation Law for the Death of JOSEPH J. ULLINGER, v. NEW YORK CAR WHEEL COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.

Third Department, December 28, 1917.

**Workmen's Compensation Law** — adopted child not an heir at law and next of kin of father of adopting parent — such child not entitled to award upon death of father of adopting parent — **Domestic Relations Law, section 114, construed.**

A legally adopted child of the daughter of a deceased employee, who was dependent upon him at the time of the accident, is not an heir at law and next of kin of the deceased, so as to be entitled to an award under the Workmen's Compensation Law.

Under section 114 of the Domestic Relations Law, an adopted child by reason of such adoption does not become an heir at law and next of kin of the father of its adopting parent.

KELLOGG, P. J., dissented.

APPEAL by the defendants, New York Car Wheel Company and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 6th day of July, 1917.

*Bertrand L. Pettigrew* and *Walter L. Glenney*, for the appellants.

*Merton E. Lewis*, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

SEWELL, J.:

Joseph J. Ullinger, deceased, was employed by the New York Car Wheel Company, and while working for his employer he received injuries which resulted in his death.

The Commission found that he left no surviving wife or child under the age of eighteen years, but left him surviving the claimant, Marion I. Winkler, aged nine years, a legally adopted child of the daughter of said Joseph J. Ullinger, who was dependent upon the deceased at the time of the accident, and awarded compensation to her under section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1916, chap. 622).

The only question for determination upon this appeal is, whether the claimant was entitled to receive compensation as the grandchild of the deceased. In other words, does an adopted child by reason of such adoption become an heir at law and next of kin of the father of its adopting parent.

Subdivision 11 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1916, chap. 622)\* provides that "'Child' shall include a posthumous child and a child legally adopted prior to the injury of the employee; and a step-child dependent upon the deceased." The decision of the

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\* Since amd. by Laws of 1917, chap. 705, so as to include an "acknowledged illegitimate child."—[REP.]

question presented must, therefore, depend upon the construction of section 114 of the Domestic Relations Law (Consol. Laws, chap. 14 [Laws of 1909, chap. 19], as amd. by Laws of 1916, chap. 453). By force of that statute a foster parent and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, "and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, \* \* \*."

It is apparent, from the provisions of this statute, that the adoption does not change the law of descent and distribution as to the property of the ancestors of the foster parent; that the right of inheritance is extended only as between the foster parent and adopted child, and between the children of the adopted child and the foster parent; that while the adopted child, for the purposes of inheritance, becomes and is the lawful child of the adopting parent, the statute does not provide that it shall become his child, or make it the heir at law or next of kin of his father or of any of his collateral relatives. The identity of the child is not changed. It is given the right to inherit as a child without being a child, and that is as far as the statute goes. There is nothing in the statute to lead to the belief that it was the intention of the Legislature to permit one to adopt heirs for third persons.

Without something in the statute clearly indicating that the Legislature intended such a provision it cannot be arbitrarily inferred by the courts to give effect to an assumed object or purpose of a statute. Consanguinity is so fundamental in statutes of descent and distribution that it may only be ignored when courts are forced to do so, either by the terms of express statute or by necessary implication.

It follows that the award should be reversed and the claim dismissed.

All concurred, except KELLOGG, P. J., dissenting.

Award reversed and claim dismissed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. GLOBE CONSTRUCTION COMPANY, INC., Respondent, v. WILLIAM C. ORMOND and Others, Constituting the Board of Assessors of the City of New York, Appellants.

Second Department, December 29, 1917.

**Municipal corporations — damages caused by change of street grade, city of New York — amendment to section 951 of charter making decision of board of revision conclusive — award cannot be reviewed by certiorari — failure to appeal to board of revision.**

Since section 951 of the Greater New York charter was amended by chapter 516 of the Laws of 1916, which expressly provides that a party interested in an award made for damages caused by a change of street grade may appeal to the board of revision of assessments and that the determination of said board shall be final and conclusive, an award made to an abutting owner by the board of assessors cannot be reviewed by writ of certiorari.

The issuance of the writ cannot be justified upon the ground that the property owner has never taken the statutory appeal to the board of revision, for in such case he has not exhausted his legal remedy and certiorari ordinarily will not issue until the statutory remedy has been exhausted.

APPEAL by the defendants, William C. Ormond and others, as assessors, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 9th day of June, 1917, denying a motion to dismiss a writ of certiorari.

On March 2, 1916, the board of assessors of the city made an award to relator of \$824 for damages caused to the property owned by relator, by a change of grade of Bay Thirty-fourth street. The relator objected to the award, and such objections were heard by the board, which overruled the objections and transmitted the matter to the board of revision of assessments, which, on March 2, 1917, confirmed the award. The relator was notified of a hearing before the board of revision, but did not attend, and on the 19th day of April, 1917, sued out the writ of certiorari. Thereafter the defendants moved to dismiss the writ, the motion was denied and the defendants appealed.

Charles J. Nehrbas [*Lamar Hardy, Corporation Counsel*, and *Terence Farley* with him on the brief], for the appellants.

*Raymond Gilleaudeau*, for the respondent.

BLACKMAR, J.:

At common law the owner of abutting property, which was damaged by a change of grade of the street, had no remedy. However, the Legislature, recognizing the injustice of this rule, has provided that such damages shall be compensated. No right of action is given therefor against the city which does the grading; but a method is provided for furnishing compensation by devoting thereto the unearned increment of value of property benefited by change of grade through an assessment thereon. (Greater N. Y. Charter [Laws of 1901, chap. 466], § 951, as amd. by Laws of 1916, chap. 516.) Upon the board of assessors this statute casts the power and duty both to judicially determine on evidence considered in the light of a view, the amount of such damage, and to levy such amount by way of assessment upon property which it determines is benefited by the grading. Any party interested in an award, or the city, may appeal to the board of revision of assessments, whose decision is made by the statute final and conclusive. We believe the statute is so worded as to preclude any review by the courts.

Before the enactment of the amendatory law (Laws of 1916, chap. 516) there was no provision that the determination of the board of revision should be final and conclusive, and the Court of Appeals held, in *People ex rel. Uvalde A. P. Co. v. Seaman* (217 N. Y. 70), that a party having exhausted his remedy by appealing from the award of the board of assessors to the board of revision, was entitled to his writ of certiorari. In deciding the *Uvalde* case the court laid stress upon the fact that the charter did not provide that the determination of the board of revision should be final, saying: "Where a statute prescribes that a specified determination shall be final and conclusive it is a bar as well to a review by common-law certiorari as by appeal." Undoubtedly it was in view of this decision, and to accomplish the result suggested, that chapter 516 of the Laws of 1916 was enacted.

But the respondent claims that the appeal has never been

taken to the board of revision, and, therefore, there is no decision of the board to conclude it. Whether, under the facts in the case, the proceedings taken pursuant to section 950 of the charter, of which it had notice, is equivalent to an appeal by the city, so that the decision of the board of revision has the statutory effect of concluding the matter, it is not necessary to decide. If there has been no such appeal and final determination, the respondent has not exhausted its remedy under the act. It was said in the *Uvalde* case (p. 76): "The writ of certiorari will not ordinarily issue until the remedy by statute has been exhausted." (See cases there cited.) We think that doctrine should be applied in this case in order to fulfill the evident intent of the Legislature that the procedure prescribed in the act should be final and exclusive of any other remedy. If the relator has not exhausted its remedy under the act, it cannot appeal to the courts and so substitute a review by the court in place of that provided by the statute. If it has exhausted its remedy, the determination of the board of revision concludes it.

We do not think that the fact that the corporation counsel, the legal adviser of the city of New York, is a member of the board of revision (Charter, §§ 255, 944; *Id.* § 255, as since amd. by Laws of 1917, chap. 602), nullifies the amendment of 1916, which makes the determination of that board conclusive. It must be borne in mind that the relator's claim is not against the city. Its claim is satisfied from the avails of an assessment for benefits. The city is the agency for collecting the assessments and paying the awards. It, therefore, has an interest in the regularity and legality of the proceedings, so that the assessment will supply the funds to pay the awards; but its interests are not hostile to the relator. The Legislature has confided to officials of the city the administration of the law, and the rights of relator are derived from the law and have no existence independent of its operation.

I recommend: Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

JENKS, P. J., THOMAS, STAPLETON and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

BENJAMIN STANGER, Respondent, v. SUN PRINTING AND  
PUBLISHING ASSOCIATION, Appellant.

First Department, December 31, 1917.

**Pleading — libel — statement that case of contagious disease existed on plaintiff's premises — complaint not stating cause of action.**

A complaint for libel which in substance alleges that the defendant published an article falsely stating that a case of infantile paralysis, which was then epidemic, existed in a house of a certain number on a certain street, being the same address at which the plaintiff was engaged in manufacturing and selling mattresses and bedding, whereby persons shunned and avoided the plaintiff's premises and certain customers refused to deal with him, resulting in certain losses of money, does not state a cause of action, there being no allegation that the publication was maliciously made and with a willful intent to injure the plaintiff's business.

APPEAL by the defendant, Sun Printing and Publishing Association, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of August, 1917, granting plaintiff's motion for judgment on the pleadings consisting of a complaint and the demurrer thereto.

*Macdonald De Witt*, for the appellant.

*David Goldstein* of counsel [*Goldstein & Goldstein*, attorneys], for the respondent.

SMITH, J.:

The plaintiff is engaged in manufacturing and selling mattresses and bedding in premises known as 2675 Eighth avenue, in the borough of Manhattan. He is the sole tenant of said premises. His complaint is that upon July 31, 1916, there was published in the defendant's paper an article in reference to the infantile paralysis epidemic of 1916, wherein it was falsely stated that one of the new cases of infantile paralysis reported by the health department the day before was that of Celia Ducker, 2675 Eighth avenue; that the article was false in the particular named, and was negligently, carelessly, wrongfully and untruthfully published,

and that his business was damaged thereby to a large amount, for which he claims indemnity. To this complaint a demurrer was interposed, and the court (N. Y. L. J., February 24, 1917) sustained the demurrer upon the ground that the special damage to the business was not alleged with sufficient particularity, under the authority of *Reporters' Association v. Sun Printing & Publishing Assn.* (186 N. Y. 437). Thereafter, the complaint was amended, and in the allegation of damage it is stated that the said publication caused the plaintiff's premises to be shunned and avoided, and that the following customers of the plaintiff had refused to and still refuse to patronize the plaintiff's place of business: "Mrs. Watson, who refused to purchase two mattresses from the plaintiff of the value of \$10; Mrs. Cohen, who refused to purchase two mattresses of the value of \$10 from the plaintiff; Mrs. Burns, who engaged the plaintiff to upholster a parlor suit for her and refused to permit the plaintiff to upholster the same, thereby causing a loss to the plaintiff of \$25; Mr. Latzkos, a dealer in furniture, to whom plaintiff sold furniture amounting to the sum of \$200 per month; Mr. Mitchell, who refused to buy mattresses from the plaintiff, amounting to \$15." The amended complaint, as the prior complaint, charged that the defendant in a newspaper called *The Sun* "Caused to be negligently, carelessly, wrongfully and untruthfully written and printed, and thereupon published and thereupon circulated of and concerning this plaintiff and wrongfully [*sic*] and untruthful and false matter and statements, namely: \* \* \*." To this amended complaint the defendant also demurred. The plaintiff procured an order for judgment upon the pleadings, and the defendant appeals, alleging that the complaint is insufficient in two respects, *first*, that the special damages are not pleaded with sufficient particularity to enable the defendant to prepare for trial, and *secondly*, that the publication is not alleged to have been made maliciously or with the willful purpose of inflicting injury.

Without passing upon the first ground of challenge, we are of opinion that the complaint wholly fails to state a cause of action for the failure to state that the publication was made maliciously and with a willful intent to injure the

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plaintiff's business. All the damages sought in this action are damages to plaintiff's business. In fact, that is all the damage that could be sought, and it is perfectly evident that the plaintiff could not truthfully allege, if he would, that there was any malice or willful intent to injure his business. It was apparently a pure mistake, and for the damages accruing therefrom the party is without remedy. (*Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119.) In that case it was held that to maintain an action for a libel injurious to plaintiff's business, it must be shown not only that defendant's publication was not justified in fact, but that it was with malice or a willful purpose of inflicting injury. As the complaint contains no such allegation, the motion for judgment on the pleadings should not have been granted, and the order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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SOL BLOOM, Appellant, v. FLORENCE M. SUTTON, Respondent,  
Impleaded with ROBERT L. REDFIELD and EMMA B. REDFIELD, His Wife, Defendants.

First Department, December 31, 1917.

**Pleading — answer — counterclaim in action to recover for breach of contract to convey lands — alleged modification of contract — malicious filing of contract after default.**

Where a plaintiff sues to recover earnest money paid on a contract for the sale of real estate and the expense of searching title, the defendant having failed to perform because the title was unmarketable, a counterclaim, which seeks to recover broker's commissions and attorney's fees upon allegations that the original contract of sale was modified and that the defendant was ready and willing to perform the modified contract and tendered a deed in conformity therewith and that the plaintiff defaulted, is insufficient in law and a demurrer thereto should be sustained.

Nor can a counterclaim be founded on the wrongful and malicious filing of the contract after the time fixed for passing title and after plaintiff's default, for it alleges a tort which does not arise out of the contract set forth in the complaint and is not connected with the subject-matter of the action.

APPEAL by the plaintiff, Sol Bloom, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of May, 1917, denying plaintiff's motion to sustain his demurrers to the first and second counterclaims in the amended answer of the defendant Florence M. Sutton, and granting the motion of said defendant to overrule the said demurrers.

*Edward F. Spitz* of counsel [*M. J. Stroock* and *W. S. Dryfoos* with him on the [brief], *Stroock & Stroock*, attorneys, for the appellant.

*R. L. Redfield* of counsel [*Hill, Lockwood, Redfield & Lydon*, attorneys], for the respondent.

PAGE, J.:

The action is to recover the sum of \$5,000, paid as a part of the purchase price, on the signing of a contract for the sale of real estate and also for the expense in searching the title, the defendant Sutton having failed to perform because of an unmarketable title.

The amended answer of the defendant denies the essential allegations of the complaint, and for a first counterclaim alleges a modification of the original agreement, her readiness and ability to perform according to its terms and that she tendered a deed in conformity therewith, and plaintiff's default. Damages of \$2,500 for broker's commission and attorney's fees are alleged and sought to be recovered. This counterclaim is insufficient in law. If the plaintiff establishes the fact that the contract is as alleged in his complaint it effectually disposes of the defendant's claim that the contract was different and defendant could not reduce the recovery by showing a breach of a contract which she alleged but had failed to prove. If the defendant succeeds in proving under the denials that she tendered performance of the contract

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that actually existed, and that plaintiff was in default, she would retain the \$5,000.

The second counterclaim is for the wrongful and malicious filing of the contract after the time fixed for the closing and after plaintiff's default. This alleges a tort and cannot be interposed in the action because, if after default, it does not arise out of the contract or transaction set forth in the complaint nor is it connected with the subject of the action. (*Uvalde Asphalt Paving Co. v. Morgan Contracting Co.*, 120 App. Div. 498, 500, 501.)

The order overruling the demurrers will, therefore, be reversed, with ten dollars costs and disbursements, defendant's motion denied and plaintiff's motion granted, sustaining the demurrers, with ten dollars costs.

CLARKE, P. J., SCOTT, SMITH and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, defendant's motion denied and plaintiff's motion granted, with ten dollars costs.

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HOWARD K. STOKES, Respondent, v. LESLIE B. SANDERS,  
Appellant.

First Department, December 31, 1917.

**Bills and notes — action on promissory note — evidence — discharge of maker in bankruptcy proceedings — Statute of Frauds — promissory note as memorandum of promise to pay debt discharged in bankruptcy.**

Where a plaintiff sued upon a promissory note claimed to have been the last of a series of renewals it was error for the court to exclude evidence of a prior discharge of the defendant in bankruptcy in which a prior note of the defendant was scheduled, if the defendant claims the note in suit was given without consideration for the accommodation of the plaintiff and its amount was different from the amount of the prior note and it was not given when the prior note became due so that it was not a renewal thereof.

*It seems, that a note given subsequent to the discharge in bankruptcy of the maker pursuant to an oral agreement to revive a debt discharged in bankruptcy is a memorandum of the agreement in writing within the requirements of subdivision 5 of section 31 of the Personal Property Law.*



APPEAL by the defendant, Leslie B. Sanders, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of February, 1917, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 24th day of January, 1917, denying defendant's motion for a new trial made upon the minutes.

*Clarence R. Freeman* of counsel [*Charles J. Breck*, attorney], for the appellant.

*Herbert Barry* of counsel [*Barry, Wainwright, Thacher & Symmers*, attorneys], for the respondent.

PAGE, J.:

The action was brought upon a promissory note. The defendant proved that the note in suit was the last of a series of renewals, the first note having been given in June, 1908, and that there was no consideration for the note of June, 1908, but that the same was given solely for the accommodation of the plaintiff. The plaintiff then proved that in June, 1907, the defendant had given the plaintiff a note for \$5,500 for money advanced in a business enterprise in which he and the defendant were copartners; that on September 2, 1907, the defendant paid \$75 on account and renewed the note for \$5,425. The last note of this series was the note of December third for \$5,425 which was due on March third. There is an indorsement on the back of this note: "12/31/07 Recd \$75 a/c within note."

Plaintiff testified that there was paid a further sum of \$125 on this note, which would reduce the debt to \$5,225. The defendant offered in evidence his bankruptcy proceedings on December 20, 1907, in which this note was scheduled, but objection thereto was sustained. In this I think the learned trial justice erred. The note of June, 1908, was not for the exact amount of the balance due upon the note of December, 1907. It was not given at the time the same became due and, therefore, was not a renewal thereof, and if the debt evidenced by the note of December had been discharged in bankruptcy proceedings the former indebtedness would not furnish a consideration for the giving of this note

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unless there was an agreement to that effect. Evidence was excluded as to any agreement between the parties at the time of the giving of this note, the agreement having been testified to as being parol. The Personal Property Law (Consol. Laws, chap. 41 [Laws of 1909, chap. 45], § 31) provides:

“Agreements required to be in writing. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: \* \* \* 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy.”

If it had been shown that the parties had orally agreed to revive the debt discharged in bankruptcy and had given this note pursuant to such agreement, the statute would have been satisfied because it would have been a note subscribed by the party to be charged and a promise to pay, but inasmuch as the bankruptcy was not proved nor the agreement and the note was not shown to be given in renewal of the preceding series of notes and no consideration therefor proved, the verdict directed for the plaintiff was improper.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SCOTT and SMITH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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GEORGE W. HARDING, as Administrator, etc., of LINCOLN HARDING, Deceased, Appellant, v. THE CITY OF NEW YORK and PATRICK TULLY, Respondents.

First Department, December 31, 1917.

**Motor vehicles — negligence — municipal contractor — death of occupant of hired automobile which ran into excavation — erroneous charge — liability of one who hires automobile for negligence of chauffeur.**

Action against the city of New York and a municipal contractor to recover for the death of the plaintiff's intestate who, while riding in a hired automobile driven by a professional chauffeur, was killed by the overturning

of the car which ran into an excavation alleged to have been left in the night time without guard and without lights. It appeared that the intestate took no part in and gave no directions as to driving the car, except by directing the chauffeur as to their destination.

*Held*, that a judgment for the defendant should be reversed because of an erroneous charge which involved a ruling that any negligence of the chauffeur which contributed to the accident was imputable to the intestate.

APPEAL by the plaintiff, George W. Harding, as administrator, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Bronx on the 9th day of April, 1917, upon the verdict of a jury, and also from orders entered in said clerk's office on the 28th day of March, 1917, and the 10th day of April, 1917, respectively, denying plaintiff's motion to set aside the verdict and for a new trial.

*Don R. Almy* of counsel [*William S. Evans* with him on the brief], *Almy, Van Gordon, Evans & Kelly*, attorneys, for the appellant.

*E. Crosby Kindleberger* of counsel [*Terence Farley* and *Thomas G. Price* with him on the brief], *Lamar Hardy, Corporation Counsel*, attorney, for the respondent the City of New York.

*F. H. J. Maxwell* of counsel [*Alfred E. Holmes*, attorney], for the respondent Tully.

PAGE, J.:

The action is to recover damages for the negligent causing of the death of plaintiff's intestate. The facts of the case as developed by the evidence are as follows: On November 5, 1915, about a quarter of twelve at night Lincoln Harding employed the automobile driven by Raymond Dilg to take him and a young lady to the young lady's home. After leaving the young lady at her home on Kinsella street, Harding got into the automobile, sitting in front next to Dilg, who was driving. Dilg was an experienced licensed chauffeur, operated an automobile for the owner, doing private hacking and receiving a salary of twenty-five dollars a week from the owner of the car. Harding took no part in and gave no directions as to the driving of the car, except directing the

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chauffeur as to their destination. While proceeding along the Southern boulevard on the return trip at a speed of from twelve to fourteen miles per hour the car ran into an excavation, dirt having been thrown upon each side. When the auto struck this hole the steering wheel was wrenched out of the hands of the chauffeur and his feet were thrown off from the clutch pedal, thus losing control of the car which swung around and ran into the curb and then turned over, pinning Harding and Dilg underneath the machine. From the injuries thus sustained Harding died. This excavation was being made by the defendant Tully under a permit from the city of New York. It is claimed that this excavation was not guarded by any barrier nor were there any red lights upon it to warn traffic. The case was submitted to the jury with a most unfair and erroneous charge, the learned justice apparently being of the opinion that any negligence of the chauffeur that contributed to the accident was imputable to plaintiff's intestate. The charge was also argumentative strongly in favor of the defendants' contentions and against those of the plaintiff. The jury returned a verdict for the defendants. The corporation counsel admits that the charge is so unfair that the verdict cannot be sustained unless there was no evidence of the defendants' negligence sufficient to carry the case to the jury.

The city called a number of witnesses who swore that the excavation was guarded by a barrier and that there were red lights upon it. On behalf of the plaintiff, Dilg, the chauffeur, testified that there was no barrier or red lights at this excavation. In this he was corroborated by Hugh Lundon, John J. Zito, Dr. George W. Smith and inferentially by William J. Brouse and Herman Egner, all disinterested witnesses.

With this testimony in the case the question of the defendants' negligence was fairly a disputed question of fact for the determination of the jury.

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

CLARKE, P. J., SCOTT, SMITH and SHEARN, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to appellant to abide event.

LEOPOLD HELLINGER, Respondent, v. THE CITY OF NEW YORK, Appellant.

First Department, December 31, 1917.

**Municipal corporations — city of New York — right to erect and maintain public bath — injury to adjoining easements by encroachment upon public street — eminent domain — just compensation must be made — when removal of encroachment not compelled by injunction — relief by way of compensatory damages — when no damages for injury to right of access.**

While the city of New York under its police powers may erect and maintain a public bath for the conservation of the health of its inhabitants, it has no right to erect an entrance with columns which extend beyond the building line and encroach upon the street to the detriment of the easements of light, air and access appurtenant to adjoining property.

While section 50 of the charter of the city of New York relating to municipal powers may authorize the city to appropriate a portion of a street for access to a public bath so that such structure will not constitute a public nuisance, it cannot deprive an adjoining landowner of easements in light, air and access without just compensation, for such property rights are within the protection of the provisions of the Constitution relating to the exercise of eminent domain.

However, the city will not be required by injunction to remove such structure when the injury to easements of light, air and access may be compensated in damages and especially so when the expense and inconvenience to the city by removing the structure and remodeling the building will greatly exceed the damages to adjoining property.

In such case the court will refuse injunctive relief and either remit the plaintiff to his action at law, or will award him damages.

Damages will not be awarded for injury to the plaintiff's right of access to his premises where he himself has encroached upon the street to an equal extent by the erection of railings and a cellarway, but he is entitled to compensation for the appropriation in the easements of light and air.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of July, 1916, upon the decision of the court after a trial at the New York Special Term.

The judgment enjoined the maintenance of stone stairways, columns and ornamental stone work in front of public baths adjoining plaintiff's premises.

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*Charles J. Nehrbas* of counsel [*Terence Farley* and *Charles V. Nellany* with him on the brief], *Lamar Hardy, Corporation Counsel*, for the appellant.

*Samuel Hellinger*, for the respondent.

PAGE, J.:

The plaintiff is the owner of the premises known as Nos. 350 and 352 East Fifty-fourth street, in the city and county of New York. The city of New York has erected and ever since May, 1909, has maintained on the premises adjoining to the west, a five-story public bath and gymnasium, seventy-five feet in width and one hundred feet in depth. The front wall of the building is on the street line, but there extends therefrom four flights of stone steps which project five feet eleven inches upon the sidewalk. There are four large columns rising from the stoop and extending beyond the front of the building from four feet three inches at the base to three feet two inches at the top. These columns are surmounted by capitals extending four feet three inches. Above these is an entablature and a cornice the latter extending six feet nine inches from the front of the building. This ornamental structure extends above the middle of the windows on the top floor of the plaintiff's building. Plaintiff alleges that by reason thereof his easements of light, air and access to his premises from the street are seriously impaired and that his property is rendered less desirable for occupation, that the rental value thereof has decreased and that his property is permanently injured by such structure. The city claims the right to use this portion of the street for the purposes to which it is devoted because the same is a public use for the conservation of the health of its inhabitants and hence within the police powers delegated to it by the Legislature. While the maintenance of a public bath can be so justified, the appropriation of the streets for ornamentation of the front of the building in which the bath is maintained cannot be said to be a necessary exercise of such power. The city also claims express legislative authority. (Greater N. Y. Charter [Laws of 1901, chap. 466], § 50, as amd. by Laws of 1905, chap. 629; since amd. by Laws of 1916, chap. 592.) While

this section may authorize the city to appropriate a portion of the street for access to the bath and hence not constitute a public nuisance, this grant of power is expressly limited "subject to the Constitution and laws of the State." One of the constitutional safeguards that the city cannot violate is that which provides that private property shall not be taken for a public use without just compensation. (Const. art. 1, § 6.) Ever since the case of *Story v. N. Y. Elev. R. R. Co.* (90 N. Y. 122) it has been the settled law of this State that the easements of the abutting owners of light, air and access are property rights within the meaning of this constitutional provision. This is not an action by a taxpayer to redress a public nuisance by the appropriation of the public street to the detriment of its use by the public, nor is it an action against a private individual for an encroachment on the street brought by an abutting owner, as was the case of *Ackerman v. True* (175 N. Y. 353), but it is an action by the owner of property for his private wrong in that his property has been appropriated by the city to subserve a public use without compensation. It does not, however, follow that the city should be compelled to remove this structure or that injunction is the appropriate remedy. *First.* While it may be that to some extent the easement of light, air and access is impaired it does not appear to be such a substantial interference that adequate relief cannot be afforded by compensatory damages. *Second.* The expense and inconvenience to the city by compelling the removal of the structure and the remodeling of the building greatly exceeds the damage done to plaintiff's property. In such cases the courts refuse the injunctive relief and either remit the plaintiff to his action at law, or award him damages. In so far as the plaintiff's access to his premises is to be considered, it is to be noted that by reason of the fact that he has encroached upon the street with railings and a cellarway to substantially the same extent as the city that the city's encroachment has not damaged him to any appreciable extent. For whatsoever he may have been damaged by the appropriation of the light and air of the premises, he should be compensated.

The judgment should be reversed and a new trial ordered, in which the plaintiff may recover his damage, if any, for the

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impairment of his easement of light and air, costs to appellant to abide event. Any judgment herein against the defendant for fee damage should provide that plaintiff procure a release, executed by all persons and corporations having an interest in or lien upon the plaintiff's premises, including all mortgages, and granting to the defendant all right, title and interest in and to such property or easement as have been taken by the said defendant. Said conveyance the defendant to be entitled to receive upon payment or tendering the sum or sums, if any, which may be fixed for the avoidance of any injunction awarded or decreed by said judgment. Findings inconsistent herewith are reversed.

CLARKE, P. J., LAUGHLIN, DOWLING and SMITH, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order to be settled on notice.

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JAY D. CUDNEY, Appellant, v. R. B. PHILLIPS MANUFACTURING COMPANY, Respondent.

First Department, December 31, 1917.

**Master and servant — action for breach of contract of employment — evidence raising questions for jury — erroneous dismissal of complaint.**

Action to recover damages for breach of a contract employing the plaintiff to build up a sales organization for the defendant. Evidence examined, and *held*, that the jury would have been justified in finding that the plaintiff made an unqualified acceptance of the defendant's offer of employment and that a dismissal of the complaint was error.

*Held further*, that the contract of employment was binding although the plaintiff's duties were not definitely fixed.

While it is common to specify duties in a contract of employment it is not an essential where the contract makes the employer the judge of what is to be done and names the one whose orders the employee undertakes to carry out.

*Held further*, that the evidence might justify a finding that the employment was for the term of one year.

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APPEAL by the plaintiff, Jay D. Cudney, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 4th day of June, 1917, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

*Woolsey A. Shepard* of counsel [*Thomas & Houghton*, attorneys], for the appellant.

*Francis P. Pace*, for the respondent.

SHEARN, J.:

This is an appeal from a judgment dismissing the complaint in an action brought to recover damages for breach of a contract of employment, negotiated partly orally and partly in letters between the plaintiff and one Phillips, the president of the defendant. There was a good deal of informality about the negotiations, evidently due to the fact that the parties were intimate friends, but a review of the evidence shows that the plaintiff made out a *prima facie* case, consisting of an offer by the defendant and what the jury would have been warranted in finding to be an unqualified acceptance of the offer by the plaintiff.

Plaintiff, who was earning over \$5,000 a year in a responsible position in Buffalo, was asked to meet Phillips in Ottawa and did so on December 7, 1915. At the interview, Phillips outlined his plan for building up and developing the business of the defendant, which was expected to absorb various other companies at the conclusion of the war, and expressed his desire to employ the plaintiff to build up a sales organization and wanted him to begin work on January 1, 1916. Plaintiff demurred at leaving his present employers on such short notice and Phillips said that February first would be satisfactory. Plaintiff suggested a salary of \$6,000 a year, which Phillips agreed to. Phillips told plaintiff to go home and write him his understanding of the arrangement and "if it is as I understand it, I will accept it." Plaintiff wrote such a letter on December 9, 1915, stating his understanding, thanking Phillips for the offer, and saying "you may consider the same accepted, providing you let me know promptly as to what capacity I will be expected to fill." On December seventeenth

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Phillips wrote, acknowledging the letter of December ninth and advised plaintiff that his letter "is exactly according to my understanding with you and contents are satisfactory to me." It will be noted that this did not definitely close a contract because Phillips did not let plaintiff know in what capacity he was to be employed, a condition imported by plaintiff in his qualified acceptance. On December 20, 1915, plaintiff wrote Phillips asking him to supplement his letter of the seventeenth by advising plaintiff approximately concerning the work that he was expected to do and in which one of Phillips' various companies he was to be employed. On January 8, 1916, Phillips replied, using the stationery of the defendant corporation and signing the letter "R. B. Phillips Manufacturing Co., Ralph B. Phillips, President," saying he would expect plaintiff to report on the first of February "although I have not as yet decided what your duties are to be, but will advise you between now and then." While this did not meet plaintiff's conditions for acceptance, it clearly left the offer open. On January fourteenth plaintiff acknowledged the letter of January eighth and informed Phillips that he had made arrangements to make his headquarters at the Engineers Club in New York and "I trust that you will find it convenient and agreeable to let me know what position you propose to place me in, at the earliest possible date." He received no letter replying to this, so the matter was still unclosed on January 14, 1916, but the offer was still open. On January twenty-fourth Phillips wired plaintiff: "Report to me at Hotel Belmont New York February first." In response to this telegram plaintiff reported at the Belmont on February first. He did not find Phillips there but was informed that he was expected in a day or two, and continued to report until the ninth or tenth. He greeted Phillips with the words: "Well, boss, what are the orders?" Phillips told him that his hands were tied temporarily and requested plaintiff to "wait around." Plaintiff reported from day to day but received no instructions and protested to Phillips who told the plaintiff that he had nothing to worry about because he had "a perfectly good contract" with the defendant. In the latter part of February plaintiff wrote to the defendant, to Phillips as an individual and to one of the

latter's companies, the American Steam Gauge and Valve Manufacturing Company, whose stationery was used for some of the correspondence, and demanded his salary. On March second the defendant replied denying any contract. Thereupon plaintiff obtained other employment at a much smaller salary than that promised by Phillips and much less than that paid him in the position he had given up in reliance upon the offer of Phillips.

The plaintiff claims, on this evidence, that he was employed on February first for a year. Defendant insists that the matter was never closed. It is very clear that the defendant's offer was open up to February first. The question is whether plaintiff unqualifiedly accepted the offer. He had previously shown that he was entirely willing to accept the offer provided his position and duties were made clear. This proviso was put forward by him in his own interest and it was entirely competent for him to waive it if he saw fit. His claim is that he did waive it and that this is shown by his reporting for orders on February first in pursuance of Phillips' telegram and by unqualifiedly offering to go to work under whatever orders Phillips had for him. Of course plaintiff's conduct is open to the interpretation that he came to New York to negotiate the matter further and that his calling at the Belmont was for that purpose and was not an acceptance of the offer, but it seems to us that it would have been an entirely reasonable inference that plaintiff abandoned the condition that he imported into his qualified acceptance and accepted defendant's offer unqualifiedly. In such case, of course, the inferences are to be drawn by the jury. Accordingly the court erred in dismissing the complaint.

Respondent further claims that there was no binding agreement because plaintiff's duties were not definitely fixed, but this point is not well taken, for the evidence shows that Phillips told plaintiff at the original interview that he wanted to put him in charge of building up a sales organization for the defendant. This is not so indefinite as to render the agreement a nullity. It is true that this sales organization was not to be built up until the end of the war, but in the meantime plaintiff was to work in the development of the company under whatever orders Phillips gave him. While it is common

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to specify duties in a contract of employment it is not an essential where the contract makes the employer the judge of what is to be done and names the one whose orders the employee undertakes to carry out.

Respondent also claims that there was no agreement for a year. This point was not raised below. However, the fact that the offer was of "\$6,000 a year," and the further fact that during the conversation between Phillips and the plaintiff at Ottawa, Phillips said that he hoped to pay plaintiff more "at the end of the year," would authorize the jury, under all the circumstances of the case, in finding that the term of the offer was one year.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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LEE E. DAY, Respondent, v. DAVID LEVINE and PHILIP CEDAR, Conducting Business under the Name and Style of the "PRACTICAL CLOTHING SPECIALTY COMPANY" and the "PRACTICAL CLOTHING COMPANY," and LOUIS GOLDBERG, Defendants.

PHILIP CEDAR, Appellant.

First Department, December 31, 1917.

**Malicious prosecution — arrest and prosecution based upon information received from others — failure to show want of probable cause — when issue as to probable cause for court, not for jury.**

Where in an action for malicious prosecution it appears that the defendant caused the plaintiff's arrest on being informed by a trustworthy employee that the latter had actually seen the plaintiff take stolen goods from the defendant's premises and it is uncontradicted that the defendant entertained no malice toward the plaintiff, the complaint should be dismissed, for the defendant, as a matter of law, had probable cause for the prosecution.

Where there is no dispute as to the facts the existence or non-existence of probable cause is for the court, not for the jury.

In the absence of some improper motive or malicious intent a person may secure the arrest and prosecution of another upon the statement of a trustworthy informant that he has knowledge of the guilt of the accused based upon personal knowledge strongly tending to establish guilt, which facts were communicated to the person causing the arrest by the one having personal knowledge thereof.

APPEAL by the defendant, Philip Cedar, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of February, 1917, upon the verdict of a jury for \$600, and also from an order entered in said clerk's office on the same day denying appellant's motion for a new trial made upon the minutes.

*Daniel P. Hays* of counsel [*Hays, Hershfield & Wolf*, attorneys], for the appellant.

*Wilford H. Smith*, for the respondent.

SHEARN, J.:

The defendant Cedar appeals from a judgment entered upon a verdict for plaintiff in an action for malicious prosecution.

There is no contradiction whatever with respect to the fact that defendant Cedar was informed by his head shipping clerk, Goldberg, a man who had been in Cedar's employment for many years and who had proved to be an honest and faithful employee and in whose reliability the defendant Cedar had reason to have and did have confidence, that Goldberg had actually seen the plaintiff take the stolen bundle of clothes from the building in which Cedar's business was conducted, and under circumstances that pointed only to guilt. It is also uncontradicted that the defendant Cedar entertained no malice toward the plaintiff and that whatever connection he had with the prosecution was not prompted by any malice toward the plaintiff.

It is the settled law applicable to this class of cases "that where there is no dispute about the facts, the question of the existence of probable cause, or, as generally stated, the absence or want of probable cause, is a question for the court and not for the jury." (*Anderson v. How*, 116 N. Y. 336, 338; *Francis v. Tilyou*, 26 App. Div. 340, 342.)

In determining whether there was probable cause, the

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rule to be applied is the well-settled one that, in the absence of some improper motive or malicious intent, it is entirely safe for one to procure the arrest and prosecution of another upon the statement of a trustworthy informant that he has knowledge of the guilt of the accused, based upon personal knowledge of facts strongly tending to establish guilt, which facts are communicated to the person causing the arrest by the one having personal knowledge thereof. (*Francis v. Tilyou, supra; Davenport v. N. Y. C. & H. R. R. Co.*, 149 App. Div. 432, 435.) The application of this rule leads to the conclusion that the plaintiff failed to show want of probable cause.

"Probable cause, which will justify a dismissal of the accusation is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged." (*Anderson v. How, supra*, 343.) Within this definition the proof affirmatively shows the existence of probable cause.

The judgment and order should be reversed, with costs, and the complaint dismissed, with costs.

CLARKE, P. J., SCOTT, SMITH and PAGE, JJ., concurred.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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EVA A. ELLISON, Respondent, v. FRANKLIN A. CHAPPELL,  
Appellant.

First Department, December 31, 1917.

**Principal and agent — broker's action for commissions on sale of real estate — evidence not justifying recovery — where negotiations with caretaker of property do not make her procuring cause of subsequent sale — distinction between status of established broker and caretaker of premises.**

Action to recover broker's commissions for procuring a purchaser of the defendant's real estate. It appeared that the plaintiff was employed as a caretaker of a country estate owned by the defendant and that the person who eventually purchased the property, being attracted by a sign

stating that the premises were for sale and that application should be made to a certain broker or the purchaser's own broker, entered the premises and after viewing the same had an interview with the plaintiff in which the selling price was discussed. The plaintiff thereupon sent the purchaser's card to her employer, but the actual sale of the property was made through an established real estate broker and commissions were paid to him. On all the evidence, *held*, that the plaintiff was not entitled to commissions as she did not negotiate or consummate the sale.

*Held further*, that the plaintiff did not "produce" the customer as that term is used in such transactions.

Producing a purchaser is not synonymous with merely introducing a purchaser. To produce a purchaser implies some effort or activity in discovering him, for before he can be produced he must be found.

The plaintiff in forwarding the card of the eventual purchaser was merely performing her obvious duty to her employer.

*It seems*, that an established real estate agent may "produce" a purchaser although the latter voluntarily comes to his office to inquire about property; but the situation is different when an intending purchaser attracted by the appearance of the property makes inquiry of a janitor or caretaker and leaves his card to be forwarded to the owner.

CLARKE, P. J., and PAGE, J., dissented, with opinion.

APPEAL by the defendant, Franklin A. Chappell, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of June, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 11th day of June, 1917, denying defendant's motion for a new trial made upon the minutes.

*Samuel J. Rawak* of counsel [*Cornelius C. Beekman* with him on the brief], for the appellant.

*F. Sidney Williams* of counsel [*Jordan & Williams*, attorneys], for the respondent.

SHEARN, J.:

Plaintiff brought this action to recover a broker's commission at the rate of five per cent of the purchase price of certain real property which she claimed to have sold for the defendant. Her complaint set forth two causes of action, both founded upon the same sale. One was based on an express contract and the other upon *quantum meruit*. The second cause of action was not submitted to the jury, and the verdict is based upon a finding that the contract was made as alleged and was

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performed by the plaintiff, both of which allegations in the complaint were denied in the answer and controverted upon the trial. The two issues involved were (1) whether defendant employed plaintiff as a broker and (2) whether plaintiff was the procuring cause of the sale.

On the issue of employment the proof is: That plaintiff lived on property adjacent to the real property which was sold; that she was employed by defendant as a caretaker of the property sold, which is a country estate located at Bayville, L. I., and had been employed as a caretaker since January, 1915, when she succeeded her husband who died January 28, 1915, and who had been down to the time of his death similarly employed; that in August, 1915, the defendant visited the property as a result of a letter written by the plaintiff concerning its condition, and a conversation with the plaintiff ensued, plaintiff's version of which is as follows: "One word I said to him, I said, 'Mr. Chappell,' I said, 'this property is underestimated; I think it is worth a great deal more than \$45,000.' 'Well,' he said, 'he would be glad to sell it for \$45,000.' 'Well,' I said, 'supposing I procure a purchaser, what per cent will I get?' He said, 'You will get five per cent.' I says, 'I am going to look around and see if I can't find someone,' and he said, 'Be very sure whoever you send to me, that they have not been talking with another broker first,' and he agreed to give me, if I sold the property, five per cent, providing that this man who was purchasing the property had not been talking to another broker previous to me."

Another conversation is alleged to have ensued in November, 1915, wherein defendant said, according to the plaintiff, "If I sold it he would give me five per cent." Defendant's version of the first conversation is radically different from plaintiff's and he denied the November conversation *in toto*. Without reviewing the surrounding circumstances and the various items relied upon by the parties to support their respective contentions, it is sufficient to say that the finding of the jury on the issue of the promise to pay the plaintiff five per cent if she "produced a purchaser," or, according to the November interview, if she "sold the property," is not against the weight of the evidence.



Upon the issue whether plaintiff produced a purchaser a very different situation exists. In August, 1916, a year after the contract of employment relied upon, one Thanhouser, the purchaser, while passing by the property in an automobile, was attracted to the property and, noticing signs stating that it was for sale, which signs did not give any address to which purchasers might apply, called upon a nearby hotel-keeper who directed him to the plaintiff. These signs were not put up or maintained by the plaintiff. One read: "This property for sale, about 13 acres; apply to E. Greenfield Sons & Company, or your own broker." Another sign, the existence of which at this time is in dispute, was that of a real estate agent named Hall. After receiving the direction from the hotelkeeper, Thanhouser returned to the property and had a conversation with plaintiff. According to plaintiff, she showed Thanhouser over the property and explained its desirability; Thanhouser said that he liked the property very much and asked the price and plaintiff told him \$55,000. Thanhouser said he would not pay \$55,000 and went away, but before leaving gave plaintiff two of his cards, saying, "Here is one for you and one for Mr. Chappell." One of the cards the plaintiff immediately sent to the defendant with a letter. The letter was not produced by the defendant, who claimed that it had been lost. There is a dispute as to the contents of the letter. Plaintiff testified that she said in the letter that she thought Thanhouser would buy the property and that defendant should let her know as soon as possible. Defendant testified that the substance of the letter was that the plaintiff inclosed the card of Thanhouser and said that he had been there and she had shown him the property and "that I had never given any price, but that she thought \$45,000 might bring it." The defendant's reply under date of September 15, 1916, is in evidence and is as follows:

"I have been out of town as you surmised. The card of Mr. Thanhouser I have sent to Mr. Theo. S. Hall of No. 47 W. 34th St., N. Y. city, the broker who sold the other piece of the property. I thank you for your interest and trust that Mr. Hall will be successful in making the sale.

"Mrs. Greenfield is not particularly anxious to sell and seems to think that she should realize \$55,000 for the ten

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acres that are left. I have mentioned your name to Mr. Hall."

With reference to the price which plaintiff quoted to Thanhouser there is considerable confusion in plaintiff's testimony. At first she testified to quoting a price of \$45,000 and then stated that this was at a second interview, when she had telephoned him "to come over to my place because the first time he said he would not pay \$55,000 and Mr. Chappell wrote and said that they would not accept less than \$55,000." Thanhouser said over the telephone, "What was the use of coming over," and plaintiff said, "I will try and see if I can't get the price down to suit you," whereupon he came over on the following Sunday and plaintiff told him that the property "was really worth more than \$45,000." On cross-examination plaintiff testified that at the first interview with Thanhouser "He said he would not pay \$55,000," but that the price at which the defendant had authorized a sale was \$45,000. Plaintiff could give no intelligible explanation of why she told Thanhouser that she would try to get the defendant to reduce his figure from \$55,000 when, according to her testimony, she had already been authorized by the defendant to sell at \$45,000. Thanhouser, called by the defendant, testified that plaintiff did not quote any price when he first visited the property but that she subsequently wrote him that the property was held at \$55,000 or \$65,000 but did not recollect which. Without any reference to the testimony of the defendant, the testimony above quoted leaves it very doubtful, to say the least, that the plaintiff ever quoted a price of \$45,000 to Thanhouser, but whether she did or not, that ended her activity in the matter, and the sale was subsequently effected after protracted negotiations by the regular broker of the Greenfield Estate, Hall. The purchaser maintained throughout the negotiations that he would not pay more than \$45,000 and insisted upon paying a large part of this in the shares of a corporation in which he was interested. Hall finally induced the defendant to accept \$30,000 in cash and \$15,000 in Thanhouser Film Corporation stock and the sale was consummated by and the brokerage paid to Hall.

From the foregoing it appears that the sum total of plaintiff's

activities in the matter consisted of receiving at the premises, where she was employed by the defendant as caretaker, a visit from one who was led to make his inquiry without any act whatever on the part of the plaintiff; that she showed the visitor over the property and praised it highly; that she forwarded the visitor's card to defendant; that she telephoned Thanhouser and had him visit the property a second time; that possibly she quoted the price at which the sale was finally consummated, partly in cash and partly in stock; and that she wrote to Thanhouser stating that the price at which the property was held was \$55,000, which was \$10,000 more than he was willing to pay. The question is whether on such a state of facts it can be fairly said that the plaintiff produced the customer, Thanhouser, and sold the property to him. "It is established that before a broker can be entitled to his commissions he must produce a purchaser who is ready and willing to enter into a contract upon his employer's terms, and this implies and involves the agreement of buyer and seller and the meeting of their minds produced by the agency of the broker; that the broker must be the procuring cause of the sale. He must find a purchaser and the sale must proceed from his efforts acting as broker." (*Boyd v. Improved Property Holding Co.*, 135 App. Div. 623, 626, citing *Wylie v. Marine National Bank*, 61 N. Y. 415, and *Sibbald v. Bethlehem Iron Co.*, 83 id. 381.) Clearly the plaintiff did not negotiate or consummate the sale. The plaintiff, however, invokes the rule that "When a broker calls the attention of a prospective purchaser to property which he has been authorized to offer for sale, and communicates that fact and the name of such purchaser to the owner, the owner cannot defeat the broker's claims to commission by taking up and completing the negotiations himself, unless before so doing he in good faith terminates the contract of employment." (*Travis v. Bowron*, 138 App. Div. 554.) The issue, therefore, comes down to whether the facts above recited show that the plaintiff *produced* a purchaser, within the meaning of her contract, and as that term is ordinarily understood and applied in this class of cases. Producing a purchaser is not synonymous with merely introducing a purchaser. To produce a purchaser implies some effort or activity in discovering the purchaser. Before a

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purchaser can be produced he must be found. Finding the purchaser in the first instance is certainly quite as important as communicating his name to the seller. The plaintiff did not seek out, find or discover this purchaser. He did not come to the plaintiff as a result of anything done by the plaintiff. Attracted by the property itself and seeking the name of the owner or some person through whom he could communicate with the owner, the purchaser was directed by a neighboring hotelkeeper to inquire of the caretaker on the premises, who proved to be the plaintiff, the employee of the defendant. In forwarding the card of the purchaser to her employer, plaintiff merely performed her obvious duty. She was not paid to do this, it may be said, but certainly she cannot be entitled to \$2,750 for forwarding the inquirer's card, merely because the act was not strictly within her prescribed duties as caretaker. True, she praised the property and endeavored to persuade the purchaser to buy, telephoned to him and wrote to him, as above stated, but none of these activities produced any result, and, therefore, have no bearing upon the immediate point under consideration, namely, whether in order to show performance of a contract to produce a purchaser it is necessary to show that the alleged broker found the purchaser or that the purchaser came to the broker as a result of some effort or activity on the part of the broker. In the case of one who was regularly engaged in business as a real estate broker and who maintained an office, if an intending purchaser came to the broker because he knew that such was his business, or came to the broker's office to inquire about property and the broker furnished the name of the intending purchaser to the seller, it could readily be said that the broker had found the purchaser, because their meeting would have been the result, in part at least, of the broker's efforts and activities in his business as broker. The broker is advertised by his known activities, his office, his sign and the like, and when, by reason of these things, intending purchasers are led to seek him out, it is perfectly reasonable to say that the broker has found or discovered the purchaser. Manifestly, as it seems to me, an entirely different situation is presented when an intending purchaser, attracted only by the appear-

ance of a piece of property that he is passing, makes inquiry of a janitor or hallboy or caretaker, who happens to be on the premises, and leaves his card to be forwarded to the owner. Under the circumstances disclosed in the case at bar, the plaintiff completely failed to show performance of her contract to produce a purchaser for the property.

The judgment and order must, therefore, be reversed, with costs, and the complaint dismissed, with costs.

SCOTT and SMITH, JJ., concurred; CLARKE, P. J., and PAGE, J., dissented.

PAGE, J. (dissenting):

The jury has found upon evidence amply sustaining the finding that the defendant agreed to pay the plaintiff a commission of five per cent if she produced a purchaser or sold the property. The price that was given to her was \$45,000. While it is true that Thanhouse's attention was attracted to the property by a sign indicating that it was for sale, she was the first person to show him over the property and give him the price of \$45,000. She sent Thanhouse's card to the defendant. When informed that the estate desired to get \$55,000 for the property, she wrote and telephoned to Thanhouse and induced him to bring his wife to look at the property, and showed them over the entire estate, pointing out its advantageous features. The defendant, however, in the meantime had sent Thanhouse's card to another broker who took up the negotiations and effected a sale at \$45,000, the price that plaintiff had originally offered it.

The court charged the jury that one of the first things that they must determine was whether the defendant employed the plaintiff to sell this property, and promised to pay a commission if she produced a purchaser. The jury by their verdict have found that such an agreement was made. We then have a case where a person has employed another to sell real estate and promised to pay a fixed commission if a purchaser is produced. The person thus employed produced a purchaser; that is, the broker showed the prospective purchaser the property which he had been authorized to offer for sale, gave him the price at which it was sold and communicated the name of such purchaser to the owner. Under

such circumstances the owner cannot defeat the broker's claim for commission by taking up and completing the negotiations either himself or through another broker to whom the owner had given the name of the prospective purchaser, unless before doing so he in good faith terminates the contract of employment. (*Travis v. Bowron*, 138 App. Div. 554.) The cases relied upon by the majority are clearly distinguishable from the instant case. In *Boyd v. Improved Property Holding Co.* (135 App. Div. 623) the owner told a broker that if he would mention the name of a person who would lease the premises he would call upon him and pay the broker a commission in case the deal was closed. The owner subsequently leased the premises to the person with whom the broker had negotiated, but whose identity he had refused to disclose. Held, that the broker was not entitled to the commission as his negotiations had nothing to do with the lease and he had not given the name of his party to the owner. In *Wylie v. Marine National Bank* (61 N. Y. 415) the broker opened negotiations with a prospective purchaser and afterwards abandoned them. Subsequently the owner sold to the same person. In *Sibbald v. Bethlehem Iron Co.* (83 N. Y. 378) the owner had in good faith terminated the agency before himself undertaking the negotiation of the contract; but where, as in this case, the owner avails himself of the information given by the broker, and by his own active participation, or by transmitting the information, prevents the broker from consummating the sale, the owner cannot take advantage of his own wrong and deprive the broker of his commission, where the contract was subsequently closed at the price given to the broker by the owner. Nor can I assent to the proposition that the word "produce" a purchaser imposes all the burdens on the broker that the majority of the court hold. To produce a purchaser means to bring forward or introduce a purchaser who is ready, willing and able to contract on the owner's terms. Of course, unless the owner interferes without terminating the agency, the broker must show that his efforts were the procuring cause.

Therefore, as the sale was actually consummated upon the terms specified and with the purchaser who was first called to the attention of the owner by the plaintiff, she was

entitled to recover her commission. There was no error committed in the course of the trial in ruling upon evidence, and the case was submitted to the jury with a very fair and intelligent charge.

In my opinion the judgment should be affirmed.

CLARKE, P. J., concurred.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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ROBERT H. McNAIR, Respondent, v. THORVALD MAIJGREN,  
Appellant.

First Department, December 31, 1917.

**Malicious prosecution — prosecution for larceny — failure of plaintiff to show termination of criminal proceedings in his favor.**

Action to recover damages for malicious prosecution based on the arrest of the plaintiff on a warrant charging him with larceny of certain samples of surgical instruments which he had in his possession as a salesman and which, it was contended, he failed to return upon demand. A friend of the plaintiff procured the withdrawal of the case against him by assuring the complainant that the instruments had been returned and that if any were lacking he would personally guarantee that they would be returned. As a matter of fact at the time of the arrest a portion of the instruments had not been returned. Evidence examined, and *held*, that a judgment for the plaintiff should be reversed because he had failed to establish by a preponderance of evidence that the criminal proceedings were terminated in his favor.

APPEAL by the defendant, Thorvald Maijgren, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of February, 1917, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 15th day of March, 1917, denying defendant's motion for a new trial made upon the minutes.

*John M. Stull* of counsel [*Stull, Shedd & Morse*, attorneys], for the appellant.

*Alexander S. Bacon*, for the respondent.

SHEARN, J.:

There was a verdict for plaintiff in an action for a malicious prosecution, based upon the arrest of plaintiff at Philadelphia on a warrant sworn out by defendant, charging plaintiff with the crime of larceny, in having stolen a case of surgical instruments of the value of \$200, the property of the Electro Surgical Instrument Company of Rochester. The plaintiff had been for some time prior to his arrest a salesman in the employ of the company, using samples furnished and owned by the company. The defendant was the general manager of the company and the arrest was occasioned by the failure of the plaintiff to return the samples after demand.

On the issue of probable cause, the plaintiff's case is far from strong. We shall not review the evidence on this head because the judgment must be reversed upon another ground.

The most serious point in the case is whether the plaintiff established by a preponderance of the evidence that the criminal proceedings terminated in his favor within the rule applicable to this class of actions. (*Halberstadt v. New York Life Ins. Co.*, 194 N. Y. 1, 10.) The determination of this depends upon whether the prosecution was withdrawn solely because, after plaintiff's arrest, the defendant learned that the instruments had been returned by express a day or two prior to the arrest or whether the plaintiff effected a compromise and settlement that led to the withdrawal of the charge.

On plaintiff's side we have only his own testimony, which is that immediately after the arrest he communicated with Dr. Fithian, an old friend and college classmate, and told him that he had been arrested for embezzlement of the instruments and asked him to come over from Camden; that Dr. Fithian came to his cell and said: "Just keep cool, we have the thing settled, we have got them all right;" that Dr. Fithian then said: "Have you a watch?" and that plaintiff "without thinking" handed it to him and the next he knew he was called into the courtroom and the case was withdrawn. From this it would of course appear that whatever Dr. Fithian did in the way of settling the case, plaintiff knew nothing about it and had nothing to do with it, and



this is his contention. Passing for the moment the improbability of plaintiff's testimony that there was no talk between him and Dr. Fithian with regard to getting the case settled and that his friend without a word of explanation demanded and received plaintiff's watch for some purpose or reason not disclosed, let us turn to the testimony of Dr. Fithian, who was called by the defendant. He had no interest in the controversy and his testimony, freely given, bears the stamp of truth. He was, as above stated, an old friend of the plaintiff and had gone far out of his way to assist the plaintiff in his trouble, and there is nothing to indicate any reason why he should have endeavored to make the facts suit the defendant's side of the case. Dr. Fithian testified to receiving the telephone message and promising to come right over after his office hours; that he went to Philadelphia accompanied by a lawyer and hunted up the complainant; that he assured the complainant that the case of instruments had been returned but said that he could not say that they had *all* been returned; that he assured the complainant that he would do all in his power, if all the instruments had not been returned, to get the plaintiff to return the balance and would use his influence to get him to straighten up his accounts. No conclusion was reached by the complainant. Thereupon Dr. Fithian saw the plaintiff and told him that he had assured the complainant that the case of instruments had been returned and that if all of the instruments were not returned he, Dr. Fithian, was to guarantee the balance to be returned. "I asked him if he had any security to give me for my guarantee. He said he had nothing but his watch, which he handed over. \* \* \* I went back to Mr. Maijgren [the defendant] and I told him that I had his watch and that I would use every influence in my power to have him return the rest of the instruments, and would hold his watch until such time as he said to return it. \* \* \* Then Mr. Maijgren said that he would have the case dropped." Thereupon the parties went directly to the Police Court and the complaint was withdrawn. It is conceded that not all of the instruments had been returned at this time, and it appears that one instrument and various parts of the apparatus turned over to plaintiff to enable

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him to sell the goods, which were not returned, amounted to some fifty-nine dollars in value. The arrangement between Dr. Fithian and the complainant as testified to by Dr. Fithian was corroborated by the testimony of the defendant. Weighing the improbable story of the plaintiff against the entire probable and disinterested testimony of his friend, corroborated by the defendant, and taking into consideration the fact that plaintiff knew that not all of the instruments had been returned, it must be said that the weight of the evidence is strongly to the effect not only that Dr. Fithian, acting for the plaintiff, induced the withdrawal of the complaint by giving his own guaranty, but that the plaintiff was fully aware of what Dr. Fithian was doing and acquiesced therein.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

SCOTT, SMITH and PAGE, JJ., concurred.

CLARKE, P. J.:

I concur. I am also of the opinion that plaintiff not only failed to prove want of probable cause, and that the verdict of the jury to the contrary was against the weight of the evidence, but that probable cause for the arrest was clearly established.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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CARL WEISHEIT, Appellant, v. THE PABST BREWING COMPANY, Respondent, Impleaded with CHRISTIAN HILBERT and D. G. O'DELL, Defendants.

First Department, December 31, 1917.

**Intoxicating liquors — suit to recover moneys expended in improving saloon property on faith of liquor tax certificate having forged consents — erroneous direction of verdict for defendant — false representation as to validity of license.**

In an action brought to recover losses sustained by the plaintiff who was induced to take a lease of premises for the purpose of selling liquors and who expended a considerable sum of money in equipping the premises for

that purpose before discovering that the liquor license procured by the defendant brewing company was invalid because the consents thereto were forged, it was error for the court to direct a verdict for the defendant where the jury would have been justified in finding that the defendant, although at first ignorant of the forgery, allowed the plaintiff to continue the improvements and accept the license after the defendant's agent had discovered that the consents were forged.

A representation as to the validity of a liquor tax license, which is false, even if not known to be false, is equivalent to a representation known to be false, when it is made recklessly and in utter disregard of whether it is true or false.

APPEAL by the plaintiff, Carl Weisheit, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of New York on the 13th day of April, 1916, upon the verdict of a jury rendered by direction of the court.

*Michael J. Horan*, for the appellant.

*A. S. Gilbert* of counsel [*Godfrey Cohen* with him on the brief], *Gilbert & Gilbert*, attorneys, for the respondent.

SHEARN, J.:

Plaintiff's claim is, in substance, that upon the representation of the defendant Hilbert that a valid liquor license existed authorizing the conduct of a liquor saloon at certain premises on St. Mark's avenue, Brooklyn, he paid Hilbert \$1,500 for a lease of the premises, spent over \$12,000 in fitting up and stocking the place, and went into debt to the defendant Pabst Brewing Company for an additional \$4,000 for improvements, etc., made by that company, and then, a few weeks later, found that the license was invalid. The license was canceled because the consents were forged and the plaintiff was out between \$10,000 and \$14,000 and in addition has been cast in judgment for approximately \$4,000 to the brewing company.

Plaintiff has sued to recover his damages, and has joined as defendants the brewing company, Hilbert and one O'Dell, who was employed by Hilbert to procure the consents and was convicted of filing the application with the forged consents attached. The complaint was loosely drawn and was amended twice upon the trial. The claim of the plaintiff set forth in

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his complaint after numerous amendments was that the three defendants were acting together in pursuance of a common design to defraud the plaintiff.

There is no ground whatever for holding that the brewing company was a party to any conspiracy to defraud the plaintiff, but, as the complaint was dismissed at the conclusion of the entire case and a verdict directed against the plaintiff on the counterclaim of the brewing company, the question arises whether there was any evidence of fraud on the part of Hilbert, with which the brewing company was chargeable, which warranted the submission of the case to the jury.

On October 1, 1912, Hilbert entered into the employment of the brewing company as a solicitor for the borough of Brooklyn at a weekly salary of twenty-five dollars. The contract was canceled on or about April 10, 1913, and a new contract was made whereby Hilbert was to get a commission of twenty-five cents a barrel from customers secured by him where an investment had to be made by the brewing company and fifty cents where no investment had to be made. The contract provided that Hilbert should not be considered an employee but should merely act as a broker. During the summer of 1913 Hilbert took up with the Eddy estate the matter of getting a tenant and a license for the St. Mark's avenue property owned by the estate. In this Hilbert obviously had two objects in view, first, the commission from the brewing company on sales to the new customer and, second, a commission from the customer for procuring him the business site and lease. After getting an option from Eddy, the next important step was to get a liquor license. As the number was limited, the customary method was followed of buying a license issued for some other place, closing that place and having the license transferred to the new premises. Of course such a transfer would be invalid until the property owners' consents had been obtained for the sale of liquor at the new premises. To get these consents, Hilbert employed O'Dell and O'Dell in turn claims that he employed one Hedden who actually procured the consents, Hedden taking the acknowledgments as subscribing witness and O'Dell taking Hedden's acknowledgment. The "consents" were obtained before the plaintiff came into the matter at all and although

they afterward turned out to be forged there is no substantial evidence that Hilbert knew that they were forged or that he expected or intended that they should be forged when he took the matter up, or down to the closing of the transaction with the plaintiff. Hilbert knew that he could not sell any Pabst beer in the place and earn his commission unless there was a valid license and, as this was his main business, it seems absurd to infer that he would have gone into the enterprise as a fraud from the start merely for the possible chance of getting some victim to pay him a commission for the lease. At any rate there is no evidence supporting any such inference. Hilbert made various efforts to interest different parties in the premises without success. One day a letter was sent to the brewing company by one Brady, who knew that plaintiff wished to invest in a saloon, stating that he had a party who would like to make an investment. The letter was evidently turned over by the brewing company to Hilbert, for the latter immediately got in touch with Brady and then with plaintiff, and on the 19th of September, 1913, a contract was made in the office of the attorney for the brewing company, whereby the plaintiff agreed to take the lease and to pay Hilbert \$1,500 therefor. In negotiating the matter, Hilbert, as the jury would have been warranted in finding, stated and represented to the plaintiff that the brewing company had a license on the place, that it had been carrying a license there for five and one-half months, that it had paid \$550 on a back license which sum the plaintiff would have to repay, and that the license was in the brewery's safe; further, Mr. Stoeger, the secretary and treasurer and general manager of the brewing company, stated that the brewery had a new license for the premises it had been carrying in its safe for the last four months and a half. Obviously the existence of a valid license was of the first importance because no liquor business could be carried on without it, and it was the business of selling liquor that plaintiff wished to invest in. As a result of the negotiations and believing that there was a valid liquor license outstanding, plaintiff on September 19, 1913, entered into a ten-year lease of the premises with the Eddy estate. The lease, among other things, provided that plaintiff was to bear all the expense of reconstructing the premises "so that the same

may be suitable for the purpose of conducting a saloon business and restaurant and bar." The lease was drawn by the attorney for the brewing company. The plaintiff then, and on the same day, entered into an agreement with the brewing company which, after reciting the lease just made, stated that plaintiff "is desirous of conducting a cafe in said premises," and that he had applied to the brewing company for financial assistance and sets forth that the brewing company agreed to loan him \$4,000 to be used in making contemplated improvements "so as to adapt them for use as a cafe." The loan was to be secured by chattel mortgage and the agreement provided for gradual payments and that the brewing company would not demand payment so long as plaintiff carried out his contract and made the payments provided and would purchase from the brewing company "not less than 400 barrels of Pabst beer per year." It further provided that the brewing company would advance for the plaintiff \$550 "for the purchase of a liquor tax certificate to authorize the party of the second part to traffic in liquors at the premises hereinabove described." The deal was closed and plaintiff proceeded with the reconstruction and the brewing company made its agreed advance and put in fixtures and everything was ready by November 24, 1913, when the old license was formally transferred in and a new license issued on the forged consents. As above stated, plaintiff's expenditures were approximately \$14,000, and within a few weeks he found himself without a license owing to the fraudulent consents. Now, it is clearly established that there was no fraudulent intent on the part of the brewing company or Hilbert down to the consummation of the transaction on September nineteenth, and it is utterly unreasonable to assume that the brewing company would have agreed to invest in the saloon \$4,000 of its money if it had any intimation that the license was invalid. This situation continued, with respect to imputing any fraud to the brewing company, or Hilbert, down to a certain date, as to which there is a radical dispute between the parties, and on this date the whole case turns. It appears from the testimony of O'Dell that a few days before the consents were actually filed and the new license taken out Stoeger called him to the brewery and that

they had a violent interview with respect to this license, Stoeger having been called up by another brewery and warned not to take out the new license because the consents were suspicious or bad and it would only result in a loss. O'Dell testified that he assured Stoeger that the consents were all right and that Stoeger told him that the brewery "must have this license." O'Dell at once talked the matter over with Hilbert and the jury could have readily found that Hilbert was then informed that the consents were bogus. Nevertheless, although Hilbert then knew, as the jury might have found, that the consents were forged and Stoeger knew that they were suspicious, the brewing company and Hilbert caused the consents to be filed and the application taken out for the new license and the brewing company advanced \$1,100 for this purpose, and thus permitted and encouraged the plaintiff to open up the business there with a consequent serious loss. The brewing company and Hilbert insist that this interview between O'Dell and Stoeger took place on or about December sixth on which day an article about the frauds appeared in the Brooklyn *Eagle*, and that this was their first intimation that there was anything wrong about the matter and that, therefore, they could not be in any way chargeable with encouraging or permitting or inducing the plaintiff to open up the business on the void license. Without enlarging this opinion by pointing out certain contradictions and improbabilities in defendants' version, it is perfectly clear that there was a clean cut issue between the parties and a conflict of testimony as to when this important interview took place. Assuming, as we must, that the jury could have found that the interview took place before the license was issued, what are the consequences? It had been represented to the plaintiff that a valid license existed. This representation was made by Hilbert, who on the evidence could readily have been held to have been the agent of the brewery in procuring plaintiff to take the place and there sell the brewing company's beer. Even if Hilbert were not the agent, there was the testimony that Stoeger himself made the same representation. Now, it will be said that it is improbable that the brewing company would have gone ahead and advanced the money for the license if it had known that the consents were questionable; but

it must be taken into consideration that the brewing company had already advanced at least \$4,000 in the enterprise, and that this loomed up as practically a dead loss if the arrangement with the plaintiff fell through, and further, that here was a most promising place with a customer bound to take at least 400 barrels a year, if the consents should not be investigated. A representation which is false, even if not known to be false, is equivalent to a representation known to be false when it is made recklessly and in utter disregard of whether it is true or false. That is just the situation here as the jury might have found. The brewing company never had a license for the St. Mark's place when it represented that it had, and it never had valid consents which would have entitled it to the transfer of the old license and issue of a new one. To represent that the license was valid without making an investigation into the validity of the consents would not be actionable, but a very different case is presented upon proof that there existed a reason or reasons why both the brewing company and Hilbert should have known that the validity of the consents was at least doubtful. As a matter of fact, the evidence adduced by the plaintiff, if believed, warranted a finding that before the brewing company caused the new license to be taken out it knew that the license would not stand if attacked. As to Hilbert, the evidence went further and warranted the inference that he actually was a party to some of the fraudulent acknowledgments and that he knew that the consents as a whole were fraudulent before the new license was taken out. There is an abundance of evidence from which it might have been inferred that Hilbert was the agent of the brewing company in the transaction, but, irrespective of this, when the brewing company after being warned of the fraudulent character of the consents and the invalidity of the license (if the jury should so find), took a chance and went ahead, thus inducing the plaintiff to consummate his bargain and open up the business with all the consequent expense, the brewing company adopted the representations and became responsible for the fraud committed in part for its benefit. Of course all of this would amount to nothing if the jury found that the warning as to the invalidity came after November twenty-fourth, but this was purely a question of fact upon conflicting



testimony, and the court erred in disposing of the matter as one of law. While the plaintiff cannot recover for the expenses that he incurred before the defendants began to act in bad faith, even if bad faith be established, the expenses incurred after the disputed date are very substantial and affect the amount of a possible affirmative judgment that the brewing company might be entitled to on its counterclaim.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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H. M. WEILL COMPANY, Respondent, v. ALBERTINA D. CREVELING, Appellant.

First Department, December 31, 1917.

**Real property — suit to compel specific performance of contract to give lease — memorandum of agreement too indefinite to support specific performance.**

Suit for the specific performance of an agreement to make and deliver a long-time lease of real property. Written memorandum of alleged agreement to lease examined, and *held*, to be too vague and uncertain to support a suit for specific performance.

While parol evidence is admissible to explain ambiguities in a written memorandum and to explain the meaning of terms actually employed, it cannot be resorted to in order to supply an agreement with respect to matters concerning which there has been no meeting of the minds.

A provision of the memorandum for a renewal of the lease "at a reappraisal of 5% of the value at that time by experts" is insufficient to enable a court of equity to write a lease expressing the intention of the parties, as there is no provision as to who should select the experts, or how many experts there should be, or what should happen if the experts did not agree, and parol evidence is not admissible to show the intention of the parties as to these matters.

So, too, a provision that the plaintiff is "to improve the said property to the extent of no less than \$10,000," is too indefinite and uncertain to enable equity to decree specific performance of the contract to repair.

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APPEAL by the defendant, Albertina D. Creveling, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of July, 1917, denying defendant's motion for judgment on the pleadings consisting of a complaint and answer.

*Percival C. Smith* of counsel [*Lyon & Smith*, attorneys], for the appellant.

*Sidney Rossman*, for the respondent.

SHEARN, J.:

The cause of action alleged is for the specific performance of an agreement to make and deliver a lease for twenty-one years on certain real property, pursuant to a written memorandum signed by the defendant and reciting a consideration of one dollar. The memorandum in question is as follows:

"Feb. 13, 1917.

"For the consideration of One Dollar to me in hand paid by the H. M. Weill Co. I agree to deliver to the H. M. Weill a lease for 21 years on property No. 243 West 55th, Manhattan, on the following terms: Rent to be for the first (2) years \$2,600 gross rental. (3) years at \$3,000 net rental. 5 Years at the rate of \$4,000 net rental and 11 years at a reappraisal of 5% \* \* \* but never to be less than \$4,000 net rental. A further renewal of (21) years to be granted after the expiration of the first term at a reappraisal of 5% of the value at that time by experts. The H. M. Weill Co. to improve the said property to the extent of no less than \$10,000. The rent to begin March 1, 1917.

"Witness.

(Sgd.) A. D. CREVELING,

"145 W. 4th Street,

"N. Y. City."

This memorandum is not a lease. Not only does it omit numerous clauses which are commonly considered necessary in a long lease of real property, but it does not purport to pass any interest in real property or create any estate therein. The loose manner in which it is drawn and its general informality

indicates that it is merely a preliminary memorandum to be embodied later in a formal lease which should state more fully and precisely the intentions of the parties. Indeed, the 5th paragraph of the complaint so alleges. The question is whether the agreement is sufficiently definite to be enforced specifically. With this memorandum before it, could the court write a lease to express the plain agreement of the parties, so as to embody the same in a decree? It is conceded, as it must necessarily be, that this could not be done without taking testimony to establish the intentions of the parties. Such evidence would be admissible to explain ambiguities in the memorandum, to explain the meaning of the terms actually employed, but of course cannot be resorted to in order to supply an agreement with respect to matters concerning which there had been no meeting of the minds.

With respect to the rental for the first ten years, specified as follows: "Rent to be for the first (2) years, \$2,600 gross rental. (3) years at \$3,000 net rental. 5 Years at the rate of \$4,000 net rental," there is no insuperable difficulty, for it is claimed that these expressions "net rental" and "gross rental" have a definite and well-understood meaning in the real estate trade, and, if this be so, the fact could be established by evidence which would make the terms sufficiently definite. The complaint does not allege that the expressions have a definite and well-understood meaning in the real estate trade, but that could be cured by amendment.

The provision with respect to the rental for the ensuing eleven years is utterly vague and uncertain. It provides: "11 years at a reappraisal of 5% \* \* \* but never to be less than \$4,000 net rental." What is to be "reappraised" at five per cent is not specified. Assuming that this means that the property itself is to be appraised and the rent fixed at five per cent per annum of the appraised value, it is not specified whether this rental is to be gross or not, and there is no provision whatever as to how the appraisal should be made. Plaintiff contends that inasmuch as the memorandum provides for a renewal of twenty-one years "at a reappraisal of 5% of the value at that time by experts," it may be fairly said that the parties intended, or at least that evidence might be received to show that they intended,

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that the appraisal for the eleven years was to be made by experts. But even if this were so, there is in connection with the renewal clause no provision whatever as to who should select the experts, how many experts there should be, or what should happen if the experts did not agree. Evidence could not be received to show the agreement or intention of the parties as to these matters, for this is not an ambiguity but is a plain case of supplying an agreement where none was made. A similar difficulty exists with respect to the twenty-one-year renewal clause.

Finally, there is the important provision: "The H. M. Weill Co. to improve the said property to the extent of no less than \$10,000." This is not within the exception to the general rule that equity will not decree specific performance of contracts to repair and improve property (4 Pom. Eq. Juris. [3d ed.] 2765, § 1402, note), for it is too indefinite and uncertain. There is nothing to show when this expenditure was to be made, and, assuming that it was to be within a reasonable time, there is nothing to show the nature or character of the improvements to be made, or the use that was to be made of the building, or how it was to be improved, or as to who should be the judge of the manner, character or quality of the improvements. We are forced to the conclusion that this memorandum constitutes nothing but an agreement to agree, and is, therefore, unenforcible by specific performance. To compel the defendant to deliver an instrument containing such vague and uncertain provisions as are called for by this memorandum would be merely to invite years of litigation.

The order denying the defendant's motion for judgment on the pleadings should be reversed, with ten dollars costs, and the motion granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

In the Matter of the Judicial Settlement of the Accounts of  
THOMAS CUMMINGS, as Administrator, etc., of MARTIN  
CUMMINGS, Deceased.

THOMAS CUMMINGS, as Administrator, etc., Appellant;  
FRANCES ATKINSON, Respondent.

Third Department, December 28, 1917.

**Decedent's estate — gift inter vivos — evidence — delivery of bank  
books to third person for donee.**

The uncontradicted evidence of a third person that a decedent about a month prior to his death stated to him that he had money in a bank and if anything happened to him he wanted his daughter Mrs. Ryan to have it; that his other daughter had once accused him; that thereafter said decedent delivered the bank books representing the money to said third person, saying "I want Mrs. Ryan to have it," and never asked for the books again, although he thereafter saw said third person several times, the last time the day before his death, is sufficient to establish a valid gift *inter vivos*.

The fact that the decedent might have delivered the bank books to his daughter personally, in the presence of a witness, does not tend to impeach the transaction.

COCHRANE, J., dissented on opinion of surrogate.

APPEAL by Thomas Cummings, as administrator, from a decree of the Surrogate's Court of the county of Albany, entered in the office of said Surrogate's Court on the 4th day of June, 1917, surcharging his account with the sum of \$408.

*Benjamin McClung*, for the appellant.

*Walter H. Wertime*, for the respondent.

SEWELL, J.:

The decree determined that \$408, the amount to the credit of Martin Cummings in the Cohoes National Bank at the time of his death, belonged to his estate. The question presented is whether the deceased made a valid gift of this money prior to his death to Johannah Ryan, his daughter, by delivering two bank books, which evidenced the moneys so deposited, to Matthew McDermott for her. The surrogate found that there was not a valid gift *inter vivos*. No evidence

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was given either sustaining or impeaching the evidence of McDermott, who alone testified to the facts relating to the gift. His direct testimony was that during the summer of 1915 Martin Cummings "told me he had a little money in a Cohoes bank and if anything happened to him, he wanted Mrs. Ryan to have it. \* \* \* He told me that he had been with another daughter, and I believe he told me when — that he told me once she had accused him; and Mrs. Ryan was good to him and he wanted her to have the money. \* \* \* I should judge that was [about] a month [before his death], but I couldn't say. Well, it was in the summer. [He came to my house after that.] I was sitting on the stoop and he stood a minute talking and said 'come here.' We walked up to the telegraph pole on the corner. He said 'here is the bank book of that money. I want Mrs. Ryan to have it.' " He also testified that at that time the deceased handed to him an envelope containing the bank books in question and never asked for them again; that he saw him afterwards, could not say just how many times. The last time was the day before he died. Upon cross-examination he testified that Cummings said, during the first conversation, that he had another daughter; that she had accused him and he did not care any thing about her; that he was through with her, or something of that kind and that he had lived with Mrs. Ryan ten or eleven years.

I think that the uncontradicted evidence is amply sufficient to sustain a finding that the deceased intended to part with his title to the money deposited; in other words, that the surrogate did not draw the correct legal conclusions from it.

The fact that he delivered the bank book, which was the best delivery of the funds deposited that could be made, unless the money itself had been withdrawn from the bank, and that he then said, "I want Mrs. Ryan to have it," shows that his intention was to make an absolute gift as it purported to be.

The fact that the donor might have delivered the books to Mrs. Ryan personally, in the presence of a witness, does not, to my mind, tend to impeach the transaction. Few things are done that could not have been done in another way, and it cannot be held that because a gift might have been made in a way other than as testified to, the testimony

must for that reason be ignored. I think it must be assumed that the donor had, what seemed to him, a good reason for not delivering the books to Mrs. Ryan personally. I am, therefore, of the opinion that the decree of the surrogate should be reversed upon the law and the facts and the proceeding remitted to the Surrogate's Court, with costs to the appellant against the contestant.

All concurred, except COCHRANE, J., dissenting on the opinion of the surrogate.

Decree reversed on the law and facts and proceeding remitted to the Surrogate's Court, with costs to the appellant. The court disapproves of the finding of fact that \$400 [408], the amount on deposit in the Cohoes National Bank, belonged to the estate of Martin Cummings at the time of his death, and finds that the deceased intended to part with his title to said money when he delivered the bank books to McDermott for Johannah Ryan.

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HENRY ZUCKER, Respondent, v. CHARLES ZAREMBOWITZ,  
Appellant.

First Department, January 18, 1918.

**False imprisonment — malicious prosecution — request by defendant for general verdict rather than findings on separate causes — evidence not justifying finding of want of probable cause — erroneous charge as to right of officers to arrest without warrant.**

Where in an action uniting causes for false imprisonment and malicious prosecution the court directed the jury to make separate findings as to each cause of action, but, after the defendant's objection, the court acceded to his request for a general verdict which was rendered for the plaintiff, the judgment will be affirmed on appeal if there is evidence to sustain a verdict on either cause of action, for any confusion existing was caused by the defendant himself.

It appeared that an electric motor owned by the defendant disappeared from his place of business, and he, having been informed as to its whereabouts, called at the plaintiff's store with two police officers where the motor was identified as that belonging to the defendant by comparing its number with that on the original bill of sale. The plaintiff claimed that he bought it at an auction at a place he could not remember, which state-

ment was afterwards proven to be false when he was taken to the police station by the officers, apparently on their own responsibility. On all the evidence, *held*, that a finding by the jury that the defendant acted without probable cause in bringing about the arrest of the plaintiff was against the weight of evidence, even if it be assumed that the defendant did instigate the arrest, and hence the cause of action for malicious prosecution was not established.

Moreover, the judgment based on false arrest and imprisonment cannot stand where the court erroneously instructed the jury that the offense charged against the plaintiff was a misdemeanor so that the arrest could not be made without warrant, when as a matter of fact the plaintiff was charged with knowingly receiving stolen property which is a felony and would justify an arrest without warrant.

APPEAL by the defendant, Charles Zarembowitz, from a judgment of the Supreme Court, in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 20th day of April, 1917, upon the verdict of a jury for \$250, and also from an order entered in said clerk's office on the 11th day of April, 1917, denying defendant's motion for a new trial made upon the minutes.

*Jacob C. Brand*, for the appellant.

*Joseph Gans* of counsel [*Gans, Davis & O'Neill*, attorneys], for the respondent.

DOWLING, J.:

The complaint herein sets forth two causes of action — one for false arrest and imprisonment, the other for malicious prosecution. Both issues were submitted to the jury and the trial court had directed the jury to separate its findings and to indicate, if it found for plaintiff, how much it awarded him on each cause of action, when defendant objected and insisted on a general verdict, to which the court acceded, and the verdict accordingly was rendered for plaintiff, against the appellant herein, in the sum of \$250. If, therefore, the verdict could be sustained as to either cause of action the judgment would have to be affirmed and for any confusion thus caused the defendant himself is responsible by his protest against having the recovery appropriately divided. But I am of opinion that the judgment cannot be sustained either



on the theory of false arrest or of malicious prosecution. As to the latter cause of action, the finding of the jury that the defendant acted without probable cause in bringing about the arrest of plaintiff is against the weight of the evidence. Defendant was engaged in business in East Houston street, in the city of New York, selling, among other things, electric motors. He purchased a motor, No. 304,076, from the Victor Electric Company. It weighed about twenty pounds and was used for dental and jewelry polishing. Its selling price at retail was from thirty to thirty-five dollars. About two weeks before the occurrence in question, this motor disappeared from defendant's place of business. It was a new motor, having been used only in demonstrating it. Having received information as to its whereabouts from some undisclosed source, defendant called with two police officers at plaintiff's place of business as an electrical contractor in Delancey street in the same city. There defendant saw his motor in the window, identified it, and having entered the store, compared the number on the motor with that on his original bill, which he had brought with him, and in the presence of one of the officers verified the fact that the numbers corresponded. The officer asked plaintiff what the price of the motor was, and was told by him it was ten dollars. The officer then said: "You know I am a policeman and I would like to know where you got that motor." Plaintiff replied that he bought it at an auction sale at some place in Twenty-seventh street, admitted he had no bill for it, and said he could not show the officer the place, as he did not remember where it was. The officers, concluding he was not telling the truth and as no further explanation of his obtaining the motor was forthcoming, arrested plaintiff and took him to the police station. Not only is this testimony of defendant as to what took place corroborated by the two officers, Ransburg and Wuchner, but plaintiff admitted that he had told the officers that he bought the motor at an auction sale in Twenty-seventh street. Concededly this was false, for at the station house plaintiff told an entirely different version, to the effect that about two months previously two unknown men had come into his store with this motor, which they left to be repaired and he did repair it at a cost of five dollars; that the men returned the

following day, said they had changed their minds and were going to buy a new motor and thereupon he bought the motor from them, paying them two dollars, its estimated value as fixed by him over the cost of repairs. He claimed the motor was second-hand and looked as if it had been working for ten years. The defendant was corroborated by the two officers as to the motor being new when they examined it in plaintiff's store, and an expert testified that the condition of the interior of the motor showed it had not been in operation more than twenty minutes. The motor in question was produced upon the trial and was exhibited to support the testimony as to its new condition. While the testimony is not convincing that defendant caused the arrest of plaintiff and while it may be fairly claimed that the police officers acted upon their own initiative in finally making the arrest, yet even assuming that defendant did instigate the arrest of plaintiff, I think the finding that he acted without probable cause was against the weight of the testimony. Considering the facts as they presented themselves at the time of the arrest, plaintiff had in his possession a new motor, identified by defendant as his property and supported by the evidence of his bill therefor, with the number on bill and motor the same. Defendant had never parted with this motor, but it had disappeared from his store, with a fair inference that it had been stolen therefrom. It was found at plaintiff's store, and though worth from thirty dollars to thirty-five dollars, was offered for sale at the inadequate price of ten dollars. Plaintiff offered an explanation for its acquisition by him which was so indefinite and vague and so opposed to any course of honest business dealing as to be as patently untruthful as it was afterwards conceded to be. It was this obvious falsity of plaintiff's story and his inability to give any satisfactory statement of the way he came into possession of the motor that caused the officers to place him under arrest. Whether his subsequent explanation is more plausible we are not called upon to determine. It is enough to say that the weight of the evidence is against the finding that defendant, if he caused the arrest of plaintiff, did so without probable cause.

As to the other cause of action, that for false arrest, the verdict cannot stand because of an error in the charge of

the trial court as to that particular cause of action. The court instructed the jury explicitly that the offense charged against plaintiff was a misdemeanor, and, therefore, neither the police officers nor a private person had the right to arrest him without a warrant. The crime with which plaintiff was charged was that of receiving stolen property of the value of thirty-five dollars during June, 1914, knowing the same to have been stolen, and that was not then a misdemeanor, but a felony. (Penal Law, § 1308, as amd. by Laws of 1914, chap. 93.)\* The court having charged that the offense was a misdemeanor, and that no arrest could lawfully have been made without a warrant, the jury as to this cause of action had no more left them to do than to assess damages. The court made no charge as to what defendant was required to prove to show that a felony had in fact been committed and that, therefore, the officer was warranted in making the arrest without a warrant. (Code Crim. Proc. § 177, subds. 2, 3.)

The judgment appealed from will, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and SMITH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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FRANCIS C. DALE, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

First Department, January 18, 1918.

**Telegraphs and telephones — failure of telegraph company to forward message — refusal of sender to tender exact amount of charges.**

A plaintiff is not entitled to recover damages for the failure of the defendant telegraph company to forward a telegram respecting the place where the plaintiff's mail was to be sent, where it appears that the plaintiff, having

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\* Since amd. by Laws of 1916, chap. 366.— [Rer.]

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in change the exact cost of the telegram, refused to pay the same over because one of the coins was a Columbian half dollar which had a premium value to collectors of five or ten cents, but insisted on the defendant's agent changing a five-dollar bill which the agent refused to do.

The plaintiff cannot recover the amount of his hotel bill at a certain city, where it is conceded that he intended to stay there, at least part of a day in any event.

APPEAL by the defendant, Western Union Telegraph Company, from a determination and order of the Appellate Term of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of July, 1917, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Seventh District.

An appeal is also taken from said judgment of the Municipal Court.

*Francis Raymond Stark* of counsel [*Joseph L. Egan* with him on the brief], *Albert T. Benedict* and *Francis Raymond Stark*, attorneys, for the appellant.

*Ely Rosenberg* of counsel [*J. M. Cohen* with him on the brief], for the respondent.

DOWLING, J.:

Plaintiff was in Los Angeles, Cal., on June 25, 1915, on his way east, and at six-thirty-five P. M. of that day he entered defendant's office in the Santa Fe railroad station and tendered to defendant's agent a telegram to be sent to the superintendent of a club to which he belonged in New York city, directing that his mail be sent to him at Denver, Col. (general delivery), until further notice. The charges on this telegram were one dollar and one cent. Plaintiff tendered a ten-dollar bill and one cent, when the agent said, "You will have to get change for that." Plaintiff demurred, said he was a stranger, did not know where to go to get change, and as his wife was on the waiting train he did not want to leave the station. He admits there was a ticket office in the station, but he made no effort to get the bill changed, and went to the train, got his wife to return with him to defendant's office, again tendered the ten dollars and one cent, and when the agent

refused to make change, tendered a five-dollar bill which he had obtained from his wife, but the agent still refused to make change. Then plaintiff, saying that he assumed that the agent had no change in the office, but that he should have had, searched in his pockets and produced in the presence of the agent a twenty-five-cent piece, a fifty-cent piece, two pennies and a Columbian half dollar. The agent said, "I see you got one dollar there in change." Plaintiff explained that one of the coins was a Columbian piece and exhibited it to the agent but it failed to impress him, for he replied: "You have got that \$1 and I won't take any more than that. I will tell you there is nothing stirring. I will tell you we ain't got no change." Plaintiff would not give up the Columbian half dollar to make up the exact change, for although he admits he had received it at its face value he wanted to keep it because it was worth a premium of five or ten cents. Plaintiff made no further effort to get change, and the telegram was not sent. He claims that on the second day following he stopped off at Colorado Springs and stayed there over night waiting for his mail, but it failed to reach him. He has been given judgment for the sixteen dollars paid by him for his hotel bill there for an extra day. Concededly he intended to stay there at least a part of a day in any event. I am of the opinion that plaintiff has failed to establish any cause of action against defendant. It was the duty of plaintiff to pay or tender its usual charges for sending the telegram. (*White v. Western Union Telegraph Co.*, 153 App. Div. 686.) He made no tender of the exact amount of the charges, and it affirmatively appears that, to the knowledge of the defendant's agent, plaintiff had in his possession the exact change to pay the same. Plaintiff's expectation of realizing a premium of five or ten cents on the Columbian half dollar did not justify his refusal to pay the exact charges, nor was the coin shown to be such a rarity as to warrant a desire to retain it rather than turn it over to satisfy defendant's tolls. Furthermore, the alleged financial loss to plaintiff is not shown to have been the necessary consequence of the refusal to send the telegram in question.

The determination of the Appellate Term and the judgment of the Municipal Court will be reversed, with costs to

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appellant, and judgment directed in favor of defendant, with costs.

CLARKE, P. J., LAUGHLIN, SCOTT and SMITH, JJ., concurred.

Determination and judgment reversed, with costs to appellant, and judgment directed in favor of defendant, with costs.

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ALAN H. COLCORD, Respondent, v. BANCO DE TAMAULIPAS,  
Appellant.

First Department, January 18, 1918.

**Bills and notes — inquiry as to funds of drawer — acknowledgment that drawer has requisite funds on deposit does not amount to acceptance of bill — pleading — complaint not stating cause of action — foreign law not well pleaded.**

Where a foreign bank, upon which a bill of exchange was drawn, on receiving a telegram from another bank which was contemplating the purchase of the bill inquiring whether the defendant would pay a draft of the drawer for a certain sum of money, replied by telegram that such draft was good, it did not thereby accept the draft and is not liable thereon.

The defendant's reply stating that the draft was good meant only that the drawer had the amount of the draft at that time on deposit with the defendant and did not bind it to hold the funds, or amount to an acceptance. A drawee cannot be held liable upon a contract of acceptance external from the bill unless the language used clearly and unequivocally imports an absolute promise to pay.

The plaintiff cannot recover on a second cause of action restating the facts aforesaid and also alleging, in substance, that under the law of Mexico, where the draft was drawn and where the drawee resided, a drawee must accept or refuse to accept on the same day a draft is presented for that purpose, and if the drawee allows the day to pass without returning the draft he is liable for its payment, and that the drawee retained the draft for a much longer period, where the allegations do not show that said law was in effect when the transactions occurred. A demurrer will be sustained to a complaint which merely sets forth the facts aforesaid.

PAGE, J., dissented, with opinion.

APPEAL by the defendant, Banco De Tamaulipas, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of July, 1917, overruling its demurrers

to the first and second causes of action set forth in the second amended complaint.

*Eugene Congleton* of counsel [*Rounds, Hatch, Dillingham & Debevoise*, attorneys], for the appellant.

*George H. Porter* of counsel [*Rudd, Wood & Molloy*, attorneys], for the respondent.

DOWLING, J.:

The facts upon which the two causes of action herein are based are set forth in the complaint as follows: The First State Bank and Trust Company (assignor of the claim in question to plaintiff) is a banking corporation organized under the laws of the State of Texas, and having its principal place of business at Laredo, Tex. It is hereinafter referred to as the State Bank. Defendant is a banking corporation organized under the laws of the Republic of Mexico and having its principal place of business at Tampico in the State of Tamaulipas, Republic of Mexico. On February 28, 1914, C. Barreda, as municipal president of the city of Nuevo Laredo, a municipality in the Republic of Mexico, made a certain draft or bill of exchange in writing. This (as well as all the other writings hereinafter referred to) was in the Spanish language, and translated into English read:

“ \$5,000.00 (Mexican dollars)

“ C. LAREDO, Tamaulipas, Feb. 28, 1914.

“ At three days sight pay by this Bill of Exchange, in this city, to the order of The First State Bank of Laredo, Texas, the sum of Five thousand Mexican dollars.

“ Value which you will charge with or without notice to account of

To the Bank of Tamaulipas,  
Tampico, Tampas

C. BARREDA,  
Municipal President.

“ (Endorsement) (Seal) Municipal Government  
Constitutional of Laredo, Tamaulipas.

‘ (Written). C. Laredo Tampas Feb. 28, 1914, C. Barreda (50 cent Mexican stamp affixed).’

Said draft was presented to the State Bank for purchase, which thereupon sent the following telegram to defendant:

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" LAREDO, TEXAS, *March 3, 1914.*

" BANK OF TAMAULIPAS, TAMPICO, TAMPS., Mex.:

" Please telegraph us immediately if you will pay a draft signed C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars.

" FIRST STATE BANK & TRUST CO."

To this defendant replied as follows:

" TAMPICO, MEXICO, *March 5, 1914.*

" FIRST STATE BANK & TRUST Co.,

" Laredo, Texas:

" Draft C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars is good.

" BANCO DE TAMAULIPAS."

On the same day defendant wrote the State Bank as follows:

" TAMPICO, TAM. MEX., *March 5, 1914.*

" FIRST STATE BANK & TRUST Co.,

" Laredo, Texas:

" DEAR SIRs.— On this date and through the same method we have answered your telegram relative to Dr. C. Barreda's draft for five thousand Mexican dollars, which we confirm as per enclosed transcript.

" Yours truly,

" BANCO DE TAMAULIPAS,

" P. ASSEMAT,

J. J. DIAS,

" *Mgr.*

*Cashier."*

The transcript inclosed was as follows:

" Transcript of the telegram which the Banco de Tamaulipas addresses to First State Bank and Trust Co., Laredo, Texas, on March 5, 1914.

" Draft C. Barreda, Mayor of New Laredo, for five thousand dollars is good."

The State Bank relying upon the faith of the correspondence quoted, bought the draft in question, paying 5,000 Mexican dollars therefor, and after indorsing it, so as to make it payable to any bank, banker or trust company, transmitted the draft so indorsed to defendant and duly presented it and demanded payment. Thereafter defendant telegraphed to the State Bank:



"TAMPICO, March 19, 1914.

"We return remittance 9336 because it is not correct. We are writing.  
BANCO DE TAMAULIPAS."

The letter which followed was in these terms:

"TAMPICO, TAM., MEX., March 19th, 1914.

"FIRST STATE BANK AND TRUST CO.,

"Laredo, Texas:

"DEAR SIRs.—We confirm our telegram of even date as per enclosed copy.

"Accordingly we return your remittance No. 9336 for its lacking of two signatures, to wit: Faustino Garza's as Finance Commissioner and the signature of Dr. Adolfo Salinas Puga as Health Commissioner of Nuevo Laredo. It also lacks the official seal of the municipal corporation.

"Once the above requisites having been fulfilled we will have no objection to honoring the remittance herewith returned.

"We have charged you with \$5.54 for telegram expenses. We are yours respectfully,

"BANCO DE TAMAULIPAS.

"P. ASSEMAT,

"Manager.

J. J. DIAZ,

Cashier."

Inclosed therewith was a copy of said telegram of March 19, 1914.

The State Bank procured the signing of the draft by the two officials referred to in the letter and also the affixing of the seal of the municipal corporation thereto and in this condition it was returned to defendant and again duly presented for payment. The defendant retained the draft in its possession from March 24, 1914, to December 8, 1914, ignoring repeated demands to pay the same between March 29, 1914, and October 31, 1914, on which latter date it refused payment and still refuses to pay the same. It is alleged that when said draft was accepted and when it was presented for payment the drawer thereof had deposited with the defendant funds sufficient to pay the same and which had been so deposited for that purpose.

The first cause of action is based on the theory that defendant's telegram of March fifth constituted an acceptance of the draft in question and that defendant was, therefore, liable

to pay the same. I do not believe that defendant's telegram of March fifth can be interpreted to be an acceptance of the draft in question, nor as a promise to accept the same. The State Bank telegraphed defendant an explicit question as to whether defendant would pay a certain described draft. Defendant did not reply to this question directly, nor does it appear that it was under any duty or obligation so to do. The State Bank did not say in its telegram that it was about to buy the draft upon the faith of defendant's reply. Defendant replied only that the draft was good, which reasonably meant only that C. Barreda, as municipal president of Nuevo Laredo, then had on deposit with defendant at least the sum of 5,000 Mexican dollars, but gave the State Bank no right to assume that defendant would hold the funds to meet the draft or would itself accept or pay the draft. On the contrary, the very form of the reply, not answering directly the question as to whether defendant would pay the draft, was sufficient to put the State Bank on its guard and cause it to either require an explicit answer from defendant as to whether it would accept and pay the draft, or to proceed further at its own risk. The defendant had no control over the State Bank's transactions with Barreda and it was the business of the State Bank to protect itself in its dealings with him and to make certain that the draft would be accepted by defendant before it parted with its money on the faith of the draft. An acceptance is a contract and there are no words used by defendant in the telegram which can be interpreted to mean that it agreed to accept the draft. In *First National Bank of Atchison, Kansas, v. Commercial Savings Bank* (74 Kan. 606) an acceptance was sought to be based upon the following telegrams passing between the parties:

"ADRIAN, MICH., October 15, 1903.

"FIRST NATIONAL BANK, ATCHISON, KAN.:

"Is J. F. Donald's check on you \$350. good?

"COMMERCIAL SAVINGS BANK."

"ATCHISON, KAN., October 15, 1903.

"COMMERCIAL SAVINGS BANK, ADRIAN, MICH.:

"J. F. Donald's check is good for sum named.

"FIRST NATIONAL BANK."

In that case Donald was a depositor in the Kansas bank and drew a check upon it for \$350 to a payee, who indorsed and delivered it to a third party, who in turn indorsed and delivered it to the Michigan bank. Donald stopped payment on the check before it was presented for payment, and the Michigan bank sued the Kansas bank for the face of the check and interest, claiming it had been accepted in writing, and that it had been purchased for value on the faith of such acceptance. The court held that the drawee of a check could not be held liable upon a claimed contract of acceptance, external to the bill, unless the language used clearly and unequivocally imported an absolute promise, and that the response that a check was "good for sum named" was not such a promise. In that case the reply was strictly responsive to the question, but the court said: "It indicates no clear intention to make Donald's check good whenever presented and whatever the condition of his account. It is entirely consistent with the simple purpose to state Donald's standing at the bank on the day of the telegram. It fairly means: 'Donald's account is now sufficient to meet a check for the sum named.' The writings are not equal to the unambiguous and unequivocal 'Will you pay?' and 'We will pay.'" So also in *Kahn v. Walton*, 46 Ohio St. 195, it was held that while an affirmative answer by the bank to a general inquiry whether checks of a person named for a specified sum are good is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance or certification of or otherwise create an obligation on the bank to pay, checks which the inquirer may then hold. The telegraphed query in that case was, "Are M. A. Walton's checks for \$2,000 good?" to which the bank answered: "Yes, sir." In the course of its opinion the court said: "It is manifest there was no acceptance, or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him were then good. No particular checks were mentioned in the inquiry, nor any intimation given that the enquirer had received, or was about to receive such checks; nor had the

bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most, it was information that Walton had, at its date, money on deposit to the amount stated, subject to check. *Espy v. Bank of Cincinnati*, 18 Wall. 604."

In *Myers v. Union National Bank* (27 Ill. App. 254) the query telegraphed to the defendant bank was, "Will drafts for thirty-eight hundred dollars, made by J. R. Snyder on you be paid if presented Monday?" to which the reply was sent: "Drafts named are good now." The funds of the drawer having been paid out to meet other checks, it was sought to hold the defendant for the drafts in question as upon a virtual acceptance for certification. The defendant was held not to be liable, as it had not accepted the drafts. The court said: "An acceptance is a contract, and does not differ from other contracts in the essential requirement of a meeting of minds. A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a draft, or pay a check, only on presentment. One relying on a telegram as an acceptance, should see to it that the language used will, at least, fairly bear the meaning. *Rees et al. v. Warwick*, 3 Eng. C. L., 467."

These cases support the general rule as laid down in Daniel on Negotiable Instruments (6th ed., vol. 1, p. 600): "There is no doubt that, in the absence of statutory interdiction, an acceptance may be upon a separate paper, as in a letter, for instance, as well as upon the bill itself. The drawee cannot be held liable upon a contract of acceptance external to the bill, unless the language used clearly and unequivocally imports an absolute promise to pay. Thus a written promise to accept an existing bill, or 'that it shall meet with due honor;' or that the drawee 'will accept or certainly pay it,'—or any other equivalent language, has been held to amount to acceptance. But if the language be equivocal—if it be merely stated 'Your bill shall have attention,' it is not sufficient."

The Negotiable Instruments Law of New York (Consol. Laws, chap. 38 [Laws of 1909, chap. 43], § 222) provides

that "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

It follows as the result of the reasoning of the foregoing cases that the State Bank had no right to rely on defendant's telegram that the draft was good in purchasing it, but should have insisted on a direct answer to a question whether defendant would accept or pay the draft. Not having done so, and defendant not having said in its telegram that it would either accept or pay the draft, the latter is not liable. The case of *Garrettson v. North Atchison Bank* (39 Fed. Rep. 163) is not controlling here, for in that case the question was, "Will you pay James Tate's check on you twenty-two thousand dollars? Answer," and the reply was: "James Tate is good. Send on your paper." In its opinion the court laid stress on the last words, "Send on your paper," as clearly implying that it was to be sent on for payment and not merely for acceptance. No such words were used in the case at bar. The demurrer to the first cause of action should have been sustained.

The second cause of action, after restating all the facts alleged in the first cause of action except the assignment of the claim and the retention of the draft and refusal to pay same by defendant, sets forth that defendant when the original draft was presented to it for acceptance and for payment, failed and neglected to accept or pay it; that the State Bank caused the additional signatures and municipal seal to be affixed to the draft as requested by defendant in its letter of March 19, 1914, and again on March 28, 1914, the State Bank presented the draft to defendant "for formal acceptance and also for payment;" that defendant had promised to formally accept and pay the draft (realleging the original telegram and the reply thereto), but instead refused and still refuses to keep its said promise; that defendant retained the draft in its possession from the time of its presentation until December 8, 1914, and during the whole of said time failed to formally accept or pay the draft although repeated demands for payment were made, until October 31, 1914, when it notified the State Bank of its refusal to formally accept or pay "said draft." It is then averred:

"*Sixth.* That in and by the law of Mexico it was then and there provided that when a draft of the character of the draft herein set forth is presented for acceptance, the drawee must accept it or refuse plainly his acceptance on the same day in which the bearer presents it for that purpose. And it is also the law of Mexico that if the drawee allows the day to pass without returning such draft, he will be liable for its payment."

The assignment of this cause of action to plaintiff is then alleged. This cause of action proceeds upon the theory that the telegram of March fifth was not an acceptance but an agreement to accept, for the breach of which defendant is equally liable. For the reasons heretofore assigned, I do not believe the telegram in question was an agreement to accept, any more than it was an acceptance. In so far as plaintiff pleads upon the alleged telegram as an agreement to accept, I believe the complaint is demurrable. Plaintiff does not set forth any acts done by his assignor, liability assumed by it, or moneys paid out by it, after the receipt of the defendant's letter of March nineteenth, nor does he seek to predicate any liability thereupon. Had the State Bank paid out its moneys only after the receipt of that letter, a very different question would have been presented. The statute law of Mexico sought to be pleaded not only raises a new theory of defendant's liability inconsistent with the remaining allegations of the second cause of action (which are based solely on the ground that the original telegram of defendant was an agreement to accept), but that law is so inartificially pleaded that it is not made applicable to the state of facts set forth. It is said that "in and by the law of Mexico it was then and there provided" that the drawee must accept or refuse acceptance at a certain time, but whether this law was in effect when the transactions in question occurred does not appear. It is also alleged that "it is also" the law of Mexico that if the drawee allows a day to pass without returning the draft, he will be liable. But this allegation is also vague as to time and it does not clearly show that the law was to the effect quoted when the transactions between the parties were had. For all these reasons, the demurrer to the second cause of action should also have been sustained.

The order appealed from will be reversed, with ten dollars costs and disbursements, and the demurrers to the first and second causes of action sustained, with ten dollars costs, with leave to plaintiff to serve a further amended complaint as to said causes of action on payment of said costs.

CLARKE, P. J., LAUGHLIN and SMITH, JJ., concurred; PAGE, J., dissented.

PAGE, J. (dissenting):

The sufficiency of the allegations of the first cause of action depends upon whether the exchange of telegrams of March third and fifth constitutes an acceptance of the draft so that the defendant became primarily liable thereon. In my opinion it does. If the draft had been presented to the defendant and some one duly authorized had written "good" upon the face thereof and signed the name of the defendant, there could be no doubt but that this would be equivalent to an acceptance of a negotiable bill of exchange in favor of the holder for the amount specified therein. (*Meads v. Merchants' Bank of Albany*, 25 N. Y. 143, 146.) The acceptance to be binding in favor of a holder who has parted with value upon the faith thereof, does not have to be upon the instrument itself. The Negotiable Instruments Law provides:

"§ 222. Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." (Consol. Laws, chap. 38 [Laws of 1909, chap. 43], § 222.)

A telegram satisfies the requirements of the statute; it is a writing and the method of its transmission, whether by mail or telegraph, is immaterial. (*Molson's Bank of Montreal v. Howard*, 40 N. Y. Super. Ct. [8 J. & S.] 15, 20.) The telegram was understood to be an acceptance and relying thereon plaintiff's assignor discounted it. Fairly construed I do not believe that the telegram of the defendant merely meant that C. Barreda, as municipal president of Nuevo Laredo, then had on deposit with defendant at least the sum of 5,000 Mexican dollars. The inquiry of plaintiff's assignor was: "Please telegraph us immediately if you will

pay a draft signed C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars." This was not an inquiry as to the validity of the draft or as to the sufficiency of the account of the depositor. It was an explicit request for an acceptance of a specified draft for a definite amount. The answer returned was such that had it been placed on the draft it would have constituted an acceptance. In my opinion it should be so construed.

A similar case to the one at bar is *Garrettson v. North Atchison Bank* (39 Fed. Rep. 163), cited by Mr. Justice DOWLING. The opinion in the Circuit Court of Appeals *North Atchison Bank v. Garrettson* (51 Fed. Rep. 168) did not lay stress on the words "Send on your paper." That court said: "The question put to the bank, and to which an answer was requested was not whether Tate was good but whether the bank would pay his check for a given sum. It cannot be supposed that the bank intended to return an ambiguous answer for the purpose of misleading the party asking the question and, therefore, if the answer had been limited to the words, 'Tate is good,' there would be ground for holding that the bank thereby intended an affirmative answer to the categorical question put to it; but all doubt is put at rest by the remaining words of the answer to wit, 'Send on your paper'" (p. 170). In the case at bar, the defendant replied that "Draft C. Barreda, Municipal President, Nueva Laredo, for five thousand Mexican dollars is good," the plaintiff's assignor was justified in believing that the defendant meant that if the plaintiff's assignor sent in the draft it would pay it, and where on the faith of that promise the plaintiff's assignor purchased the draft, the defendant became liable for the payment of the draft.

The second cause of action sufficiently states a promise of acceptance, not alone from the facts above mentioned, but also from the later occurrence. When the draft was presented to the defendant bank it returned it, explaining that there were two signatures and the official seal of the municipality lacking. The letter further said: "Once the above requisites having been fulfilled we will have no objection to honoring the remittance herewith returned." This letter is



evidence that the defendant considered itself bound by the telegram of March fifth.

The plaintiff's assignor secured the two signatures and the municipal seal and returned the same. It is urged that there is no consideration for this promise as the plaintiff's assignor had already paid the money for the draft. In my opinion the performance of the condition imposed was a sufficient consideration for the agreement to accept.

The fact that a draft is discounted before acceptance does not render the acceptance without consideration. "It is the settled law of this State that the right of the holder of a draft against the acceptor is not affected by the mere fact that he discounted the draft before acceptance." (*Iselin v. Chemical Nat. Bank*, 16 Misc. Rep. 437, 438.) After the draft was returned in its completed form the defendant retained it for several months. These facts would afford a consideration because the plaintiff's assignor was deprived of the right to immediately proceed against the drawer; forbearance is necessarily granted. (*Mechanics' Bank v. Livingston*, 33 Barb. 458.)

In my opinion the order overruling the demurrers to both causes of action should be affirmed.

Order reversed, with ten dollars costs, and motion denied, with ten dollars costs, and demurrers sustained, with leave to plaintiff to amend on payment of costs.

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ELFRIEDE L. BARDEN, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

First Department, January 18, 1918.

**Carriers — negligence — contributory negligence — liability of railroad company for loss of jewelry left by passenger in dining car — evidence — presumption as to commission of crime — appeal — when exception to erroneous charge not necessary.**

In an action by a passenger of defendant railroad company to recover for the loss of jewelry valued at about \$1,200, claimed by her to have been tied in a handkerchief and left in the defendant's dining car upon the table, evidence examined; and *held*, insufficient to establish proof of theft, or negligence of the defendant, rendering it liable for the loss.

No one is presumed to have committed a crime; the presumption is otherwise. Whether or not the plaintiff was guilty of contributory negligence in leaving her jewelry tied in a handkerchief upon the table in the defendant's dining car was a proper question for the jury.

An exception is not necessary when the court has charged on an entirely erroneous theory.

APPEAL by the defendant, The New York Central Railroad Company, from an order and determination of the Appellate Term of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of May, 1917, affirming a judgment of the City Court of the City of New York entered upon the verdict of a jury, and also affirming an order denying defendant's motion for a new trial.

*William Mann* of counsel [*Martin Gilligan* with him on the brief], *Alex. S. Lyman*, attorney, for the appellant.

*Ralph M. Frink*, for the respondent.

SMITH, J.:

The plaintiff was riding upon one of the defendant's trains. She says that she put some jewelry of the value of about \$1,200 in a handkerchief and tied up the handkerchief. She then went into the defendant's dining car and while there put the handkerchief with the jewelry inclosed upon the dining table. She previously had it in a mesh bag but had taken it out of the mesh bag apparently in order to use the handkerchief, although it contained these diamonds. She swears that when she left the dining table she left this handkerchief with these diamonds inclosed upon the table, having thrown the napkin over it without noticing it. In about twenty minutes she discovered her loss and came back. She claims to have shown that no one else could have come near this table or taken these diamonds except the defendant's servants and, therefore, theft was shown on their part, and that, as well as defendant's negligence, is the basis of her recovery.

There is no sufficient proof of theft. No man is presumed to have committed a crime — the presumption is otherwise. Even if there be some evidence of defendant's negligence, it is very slight and I doubt if there be enough here to charge defendant with the loss of the diamonds. It is not at all

impossible that she may have taken the handkerchief back with her into the other car and lost it on the way, or dropped it, or that the handkerchief may have been taken by the woman companion even after she got back into the other car. The plaintiff's only cause of action here is for negligence, and I am unable to see why the contributory negligence of the plaintiff is not a complete defense, if not as matter of law, certainly shown by the great weight of the evidence. The jury might say that it was contributory negligence on her part to place a handkerchief containing \$1,200 worth of jewelry on the table and leave it in the dining car upon returning therefrom. It is true that the court charged that there was no question of contributory negligence and the defendant's counsel did not take an exception thereto; but an exception is not necessary when the defendant has been charged on an entirely erroneous theory.

In the case of *Hasbrouck v. N. Y. C. & H. R. R. Co.* (202 N. Y. 363) a woman was traveling to another place to attend a reception. She allowed the trainmen to take her suitcase off the train, and when the suitcase was handed back to her it is claimed that about \$1,500 worth of diamonds had been taken therefrom. Plaintiff recovered. In that case there was no evidence whatever presented on the part of the defendant as to the exercise of care, and no witnesses were sworn for the defendant. In this case the defendant apparently did all that it could to find this jewelry but was unable to do so. The Court of Appeals in the *Hasbrouck* case said that the question of contributory negligence did not enter into that case because that was a case of bailment where the suitcase had been intrusted to the servant of the defendant. There is here no case of bailment, and no reason appears why contributory negligence is not a defense to this action.

The determination appealed from and the judgment and order should be reversed and a new trial granted, with costs in all courts to appellant to abide the event of the action.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Determination, judgment and order reversed, new trial ordered, costs to appellant to abide event.

HERMAN STEINER and Others, Copartners Doing Business under the Firm Name and Style of ZUCKER, STEINER & COMPANY, Respondents, v. AMERICAN ALCOHOL COMPANY, INC., Appellant.

First Department, January 18, 1918.

**Statute of Frauds — oral contract to deliver merchandise of more than fifty dollars in value — effect of fraudulent representation by seller that it would perform contract without reducing same to writing — pleading — complaint — sufficiency of allegations as to fraud.**

An oral contract to deliver merchandise of the value of more than fifty dollars, unenforceable under the Statute of Frauds, cannot be enforced upon the ground that the seller fraudulently represented that it was not necessary to put the contract in writing, as it would be in fact performed, the purchaser having surrendered no rights by reason of such fraudulent statement.

Complaint in an action for breach of such a contract, alleging that the fraudulent promise without intent to perform the same was made for the purpose of inducing the plaintiffs not to purchase stock elsewhere, is defective for failure to allege more fully the facts and circumstances upon which such charge of fraudulent motive is based.

The mere allegation of fraud is not enough; the facts and circumstances showing it should be alleged, with a characterization of their fraudulent purpose.

APPEAL by the defendant, American Alcohol Company, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of October, 1917, overruling defendant's demurrer to the complaint as not stating a cause of action.

*J. M. Cohen* of counsel [*Max Schenkman*, attorney], for the appellant.

*Stanley Garten* of counsel [*Garten, Friesner & Shenfeld*, attorneys], for the respondents.

SMITH, J.:

The action is brought for damages for a breach of an oral contract to deliver merchandise of the value of more than fifty dollars. Upon the day of the oral contract the defend-

ant assumed to confirm the same by a letter sent to the plaintiffs. The oral contract was made upon June 22, 1917. The letter from the defendant to the plaintiffs was of the same date. Upon June twenty-fifth the plaintiffs wrote to the defendant assuming to add to the contract certain conditions which were not included in the statement of the contract made in the defendant's letter to the plaintiffs. Thereafter, and on June twenty-sixth, the defendant wrote to the plaintiffs that inasmuch as the plaintiffs chose to change the terms of the contract the defendant refused to perform the contract.

If we assume, for the argument, that some damage is stated, nevertheless we are of opinion that the facts alleged are not sufficient to create any liability on the part of the defendant. The oral contract was unenforcible by the Statute of Frauds. (Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 85, as added by Laws of 1911, chap. 571.) The plaintiffs seek to escape the force of this objection by alleging that the defendant represented that it was not necessary to put the contract in writing because the oral contract would be in fact performed, and that this representation was fraudulent because there was no intent at that time to perform the oral contract. But no right has been surrendered by reason of this alleged fraud. The plaintiffs had no right to compel that contract to be put in writing, and while contracts are often canceled for fraud, this is the first suggestion that has come to my notice from the bench or bar that a contract can be made by fraud. It would be an easy way to completely nullify the Statute of Frauds by claiming that an oral contract made unenforcible because not in writing was made good by the fraudulent intent of the maker of the contract at the time of its making not to perform the same. A statement of the proposition would seem to be all that is necessary for its refutation.

The plaintiffs go further and say that this fraudulent promise without intent to perform the same was made for the purpose of inducing the plaintiffs not to purchase stock elsewhere, and relying upon the promise the plaintiffs were harmed by neglecting to take the opportunity to purchase these goods in the open market. It is hard to conceive what motive the defendant could have had to induce the plaintiffs

not to purchase these goods elsewhere, and for that purpose to have fraudulently made a contract which it did not intend to perform. What were the relations of the parties to induce such a fraudulent scheme? In face of the extreme improbability of the making of such a proposition fraudulently, we are of the opinion that the complaint is defective for failing to allege more fully the facts and circumstances upon which such charge of fraudulent motive is based. It is a well-settled rule of pleading in a case of fraud that the mere allegation of fraud is not enough, but the facts and circumstances showing the fraud should be alleged with a characterization of their fraudulent purpose. In this respect we deem the complaint insufficient.

The order overruling the demurrer should, therefore, be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and demurrer sustained.

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CONDON WRAPPING MACHINE COMPANY, INC., Appellant, v.  
JOHN W. DEARBORN, Respondent.

First Department, January 18, 1918.

**Attachment — validity of attachment against non-resident — effect of procurement of consummation of contract within this State.**

The mere procurement by the father of the plaintiff's president, without deceit or trickery, of the consummation of a contract in this State and the payment here of money to the defendant, a non-resident, does not prevent the plaintiff from attaching such money upon a claim against the defendant, where no representation was made to him, express or implied, that he would be free to remove the money received from the State, or that it would not be subject to any legal claims.

CLARKE, P. J., dissented.

APPEAL by the plaintiff, Condon Wrapping Machine Company, Inc., from an order of the Supreme Court, made at

the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of August, 1917, vacating an attachment.

*Edwin N. Moore* of counsel [*Griggs, Baldwin & Baldwin*, attorneys], for the appellant.

*R. Hunter McQuiston*, for the respondent.

SMITH, J.:

The defendant is a resident of Connecticut. The attachment was obtained in this State upon that ground. He was the owner of a patent and also of some drawings in which one Thomas F. Condon was interested.

From the defendant's affidavit it appears that on the 21st day of April, 1917, the said Thomas F. Condon and the defendant made an agreement in which it was agreed that Condon was to pay to the defendant \$1,000 for the said patent and the said drawings. At that time no claim was made by Condon against the defendant that anything should be deducted therefrom. It seems that they had prior negotiations upon patents and drawings and it is claimed that either Condon or this plaintiff paid to some patent attorneys in New York city the sum of \$752.25. This, it is claimed, was paid in behalf of the defendant and is the claim on which this property has been attached.

After the agreement specified, Condon wrote a letter to the defendant on April 27, 1917, containing the following: "As I understand, you are to send me a complete set of blue prints of the machines sent to the Postum Cereal Company recently and to give me an outright assignment of the patent, No. 1158186, and all claims arising under it, the consideration of which is to be \$1,000."

Upon May seventh Condon wrote to Dearborn that he would send him a check in settlement as soon as Dearborn sent him an executed assignment and a set of the blue prints. Upon May ninth the defendant wrote to Condon in answer to the letter of the seventh asking as to certain information as to what tracings and sketchings he meant, and stated: "Upon receipt of this information and your check, I will

send you the drawings and assignment papers, *or, if you prefer, I will arrange to deliver them to you.*"

Upon May tenth Condon wrote to the defendant that he desired all tracings and pencil sketches, etc., and further: "Just as soon as the above mentioned drawings, etc., together with the signed assignment is delivered, I will be glad to make settlement with you."

Thereafter the defendant wrote to Condon, under date of May sixteenth, that he was forwarding the patent and papers to defendant's attorney. The papers were sent to an attorney in New York city with directions to deliver them to Condon upon the receipt of the \$1,000. He did deliver them to Condon and received the \$1,000 and promptly thereafter this attachment was served in this action by the Condon Wrapping Machine Company, this plaintiff, upon the \$1,000 in the hands of the attorney.

Upon motion the court set aside this attachment upon the ground that Thomas F. Condon was in collusion with the Condon Wrapping Machine Company, of which his son was president, and induced the defendant to make delivery of his patents and receive the moneys in this State in order that the moneys might be here attached in an action to recover this sum of \$752.25 from the defendant. From this order the plaintiff here appeals.

It is undoubtedly true that if property were procured to be brought within the State by the trickery or device of another for the purpose of placing an attachment thereon, the attachment would be vacated. I think that it may be fairly assumed that Thomas F. Condon intended if the property were delivered to him in this State and the moneys paid herein, to attach these moneys to recover this \$752.25. I am unable to find, however, that he used any artifice or deception to procure the defendant to consummate the sale within this State.

In the letter of May ninth the defendant writes to the plaintiff that upon the receipt of the information asked for and Condon's check, he would send the drawings and assignment papers, "or, if you prefer, I will arrange to deliver them to you." In the letter of May tenth, which is in answer to it, Condon answers, as soon as the papers are delivered, that he will be glad to make settlement. I have



here recited all the correspondence passing between the parties prior to the sending of papers here for transfer and it would be going a step further than the cases have yet gone to hold that the mere procurement without deceit or trickery of consummation of the contract in New York State prevented the party from attaching the same upon a claim against a defendant residing in a different State. All the cases cited by the respondent, or by the judge at Special Term, are cases where the party had been tricked into the State by the *pretense* of a purpose which was not real.

In the case at bar, if we assume that the defendant was induced to bring his patent into the State for delivery here, it was for the purpose of getting the \$1,000, which his agent in fact received. There was no representation, express or implied, that he should be free to remove that money from the State, or that it would not be subject to any legal claims that might be made against the same. In my judgment the attachment was valid and was improperly vacated, and the order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

LAUGHLIN, SCOTT and DOWLING, JJ., concurred; CLARKE, P. J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and attachment reinstated.

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W. BURNS TRUNDLE and LEIGH BONSAI, as Receivers of the CO-OPERATIVE PLATE ICE COMPANY and the BALTIMORE PLATE ICE COMPANY, Respondents, v. JAMES BEGGS & COMPANY, Appellant.

First Department, January 18, 1918.

**Sale — breach of contract — action to recover payments upon theory of abandonment and rescission by seller — evidence — appeal — effect of directed verdict.**

A corporation promised to obtain guarantors for the performance of a contract to purchase machinery of the defendant of the value of about \$38,000, but upon failure to obtain such guarantors the contract was modified

permitting the corporation to pay \$5,000 in cash at once, which it did, and to make further payments before the property was delivered. No guarantor was furnished and no further sums were paid and the defendant did not make delivery. In an action by receivers of the corporation to recover the \$5,000 upon the theory that the contract was abandoned and rescinded, evidence examined, and

*Held*, that findings that the defendant had made default in performance, and that plaintiff had duly performed all conditions precedent, should be reversed and a new trial granted.

A motion for a directed verdict is simply a submission to the court to decide the facts as well as the law, and a decision of fact so made is subject to review and should be reversed if against the weight of evidence.

APPEAL by the defendant, James Beggs & Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 5th day of February, 1916, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 8th day of February, 1916, denying defendant's motion for a new trial made upon the minutes.

*Henry B. Twombly* of counsel [*Lemuel Skidmore, Jr.*, with him on the brief], *Putney, Twombly & Putney*, attorneys], for the appellant.

*William S. Bennet*, for the respondents.

SMITH, J.:

The Co-operative Plate Ice Company, a corporation newly formed, whose name was legally changed to Baltimore Plate Ice Company, sought to buy some machinery from the defendant of the value of about \$38,000, and agreed to present to the defendant a guarantor of its contract. They were unable to present that guarantor and the parties thereafter modified the agreement, permitting the plaintiff, instead of furnishing a guarantor, to make certain payments upon the contract prior to the delivery of the machinery sought to be purchased. The payments thus permitted to be made in substitution for the guaranty consisted of \$5,000 to be made at once, which payment was in fact made. It consisted also of the payment of the further sums within about three months and before the property was

to be delivered, amounting to about \$25,000. The plaintiffs endeavored to show that \$5,000 only was required to be paid before the delivery of the machinery as the substituted agreement, but the evidence is so improbable and so unsatisfactory, and the correspondence subsequent to the making of this substituted agreement, showing the constant endeavor on the part of the plaintiffs to get the guarantor for their contract, indicate positively to my mind that the defendant never agreed to deliver that machinery upon an advance payment of only \$5,000.

No guarantor was ever furnished and no further sums were ever paid, and the defendant did not make delivery of the machinery. Plaintiffs have sued to recover this \$5,000 upon the theory that the contract was abandoned and rescinded, and that the plaintiffs thereby became entitled to recover this amount.

The defendant's answer to the action is, *first*, that the plaintiff has violated its agreement by failing to furnish a guarantor as provided in the original agreement, and by failing to make the additional payments as provided in the substituted agreement and, therefore, is not entitled to recover back any sum paid upon the contract; and *second*, that the failure of the plaintiff to perform its agreement authorized the defendant to recover its damages sustained, which are shown to have been upwards of \$5,000. At the end of the trial both plaintiffs and defendant moved for a directed verdict, and a verdict was directed in favor of the plaintiffs for the full amount claimed. It is from that judgment so directed that this appeal is taken, as well as from an order denying a motion for a new trial.

Upon this appeal the plaintiffs contend that by the motions made both by plaintiffs and defendant for a directed verdict, the right of recovery was submitted to the trial judge to decide as a matter of law and the facts are thereby deemed established. But such is not the effect of those motions. A motion made for a directed verdict is simply a submission to the court to decide the facts as well as the law, and that decision of fact is subject to review with like effect as a decision of fact submitted in any case to a single judge, and should be reversed if the same be against the

weight of evidence. This case was heard upon a prior appeal wherein the plaintiff secured a verdict, and this court reversed the judgment founded thereupon as against the weight of evidence. (See *Zeilian v. Beggs & Co.*, 153 App. Div. 687.) The evidence is no stronger here than it was in the case there presented, but even apart from that decision I am unable to see how any judgment could be sustained which would charge the defendant as in default for a breach of this contract. The evidence to my mind clearly indicates every endeavor on the part of the defendant to perform the contract and to make the plaintiff perform its contract, and the persistent failure of the plaintiff either to furnish a guarantor or to pay the different sums of money which were provided for in the substituted agreement. It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

The findings that the defendant had made default in performance and that plaintiff had duly performed all conditions precedent are reversed.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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PIPE & CONTRACTORS SUPPLY COMPANY, Appellant, v. MASON & HANGER COMPANY, Respondent.

First Department, January 18, 1918.

**Pleading — amendment at trial allowing introduction of new affirmative defense unauthorized — evidence — admissibility of parol evidence to explain written contract — sale — waiver of time of payment.**

An amendment at the close of a plaintiff's case, authorizing the defendant to plead both payment and an accord and satisfaction, thereby introducing a new affirmative defense, is unauthorized, as the motion should be made at Special Term.

Where a written contract for the sale "of all the good second-hand pipe" was made in reference to pipe located in the seller's yard, parol evidence

of exclusion from the sale of certain pipe sold to another party is entirely inconsistent with the writing, and incompetent to vary the same.

Where an agreement to pay cash upon delivery has been waived by the purchaser's promise to pay within a short time, and the seller has not given notice of a date when it will require payment in cash, it is not in a position to claim, in an action against it for failure to deliver, that the purchaser has broken its contract by failing to pay cash upon delivery.

**APPEAL** by the plaintiff, Pipe & Contractors Supply Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 7th day of December, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of December, 1916, denying the plaintiff's motion for a new trial made upon the minutes.

*Maxwell Slade* of counsel [*David Slade* with him on the brief], for the appellant.

*Earle W. Webb* of counsel [*Phelps & East*, attorneys], for the respondent.

SMITH, J.:

The action is to recover damages for the failure of the defendant to deliver to the plaintiff iron pipes which it is claimed the plaintiff purchased from the defendant upon the 3d day of March, 1915. The purchase was in the form of a letter, which was accepted by the defendant, and the letter, as far as material, reads as follows:

"GENTLEMEN.—As per verbal arrangements made with your Mr. Sackett this morning, we herewith confirm purchase from you of all the good second-hand pipe beginning with sizes 2" and upward including in the purchase only one carload of 7" pipe at the agreed price of 1c per lb. F. O. B. cars your switch or F. O. B. our trucks Van Cortlandt Park. Terms of payment by cash as soon as each car or truck is loaded."

There are three main questions upon which the appellant relies: *First*, upon the close of the plaintiff's case the court allowed an amendment authorizing the defendant to plead both payment and an accord and satisfaction. This was unauthorized, as the motion should have been made at Special Term. A new affirmative defense was thereby introduced.

The second objection is also good. The defendant claims, and the trial court held, that the word "all" as used in the contract was ambiguous, and, therefore, allowed the defendant to swear to the fact that the agreement did not include all of the second-hand pipe, but that there was excepted therefrom pipe that was to be put in a building which the defendant was constructing, and also 4,500 feet of eight-inch pipe which it might sell elsewhere, as it would. The plaintiff complains that the effect of this evidence was to alter a written contract by parol. The contract is not quite complete. It certainly cannot mean the sale of all the second-hand pipe in the world. It might mean the sale of all the second-hand pipe belonging to the defendant or it might mean all the second-hand pipe in a certain location, and to that extent I think the defendant would have the right to supplement the agreement by showing the facts and circumstances, and even showing by parol evidence the particular pipe involved. I do not think, however, that the defendant has the right to offer any evidence as to a parol contract which is inconsistent with the written part. It appears that this contract was in fact made in reference to pipe located in the defendant's yard at Van Cortlandt Park. When the defendant then attempts to say that it did not sell all of that pipe but excluded from the sale what it might desire for its own purposes and also excluded from the sale 4,500 feet of eight-inch pipe sold to another party, it was unwarrantably varying the written contract by parol evidence. The word "all" is not in itself ambiguous, but as the contract was written certain parts of it seemed to have been omitted, and while it is always competent to supply parts of a contract that are omitted, the rule is that the contract sought to be supplied must be consistent with that written, and the limitation of the pipe to be sold sought to be supplied by the oral evidence here is apparently entirely inconsistent with that written, and, therefore, I think was incompetent to vary this written contract.

It is claimed by defendant that the plaintiff broke its contract by failing to pay cash upon delivery of these goods as stipulated. But this payment of cash upon delivery could have been waived, and upon the evidence itself it was waived

upon the plaintiff's promise to pay within a short time. The payments for iron delivered in April and May were not in fact made until November. Of course at any time the defendant would have the right after having once waived strict performance, to give notice of a date when it would require payment or else the contract be deemed rescinded. No such notice was given. In August the defendant sent a dunning letter to the plaintiff for the payment of these bills amounting to \$260, and stated that if the bills were not paid steps would be taken to collect them. It was not stated, however, that payment must be made within a certain time or else the contract would be rescinded, and in default of such notice I do not think that the defendant can claim a breach of the contract by plaintiff which would excuse it from full performance of the contract upon its part.

The judgment should, therefore, be reversed and a new trial granted for the error in permitting the amendment and in admitting evidence of reservations of the iron made at the time the written contract was signed.

CLARKE, P. J., SCOTT, PAGE and SHEARN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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**MARY E. CAMPBELL, Respondent, v. RICHMOND LIGHT AND RAILROAD COMPANY, Appellant.**

Second Department, January 11, 1918.

**Street railroads — negligence — contributory negligence — injury to person waiting for car by fall caused by her umbrella catching against car going in opposite direction — evidence — right of motorman to assume that adult will not come nearer to track — Highway Law, relating to rules of road, not applicable to street railroad.**

In an action against a street railway company it appeared that the plaintiff, standing under a bright light in the roadway in the usual place to board a car and holding an umbrella low to cover her hat, caught the same against the side of a car going in the opposite direction and was thereby caused to fall. Evidence examined, and

*Held*, that the plaintiff was guilty of contributory negligence and that the complaint should be dismissed;

That as the plaintiff was an adult, the defendant's motorman had the right to assume that she would not step any nearer to the track.

The Highway Law, section 332, providing as a rule of the road that vehicles turn to the right of the center, does not apply to a street railroad.

APPEAL by the defendant, Richmond Light and Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Richmond on the 24th day of April, 1917, upon the verdict of a jury for \$10,000, and also from an order entered in said clerk's office on the 25th day of April, 1917, denying defendant's motion for a new trial made upon the minutes.

*Frank H. Innes* [*Bertram G. Eadie* with him on the brief], for the appellant.

*Don R. Almy* [*William S. Evans* with him on the brief], for the respondent.

PER CURIAM:

When the west-bound Castleton avenue car came near to Burger avenue, the motorman saw plaintiff standing under a bright light in the roadway in the usual place to board an east-bound car. He had no reason to look for danger, as plaintiff was not crossing over, and would naturally keep away from such a west-bound car. This could be rightfully assumed, especially that an adult would not step any nearer to the single car track. (*Matulewicz v. Metropolitan Street R. Co.*, 107 App. Div. 230.) But when the motorman saw plaintiff turn and diagonally approach the track, he sounded his gong, put on the air brake, and reversed the current, but plaintiff's umbrella caught against the side of the car. It turned her around, and caused her to fall. She was to blame for letting her umbrella catch against the car. Holding it low to cover her hat, and her preoccupation in looking the other way, account for her not seeing the lighted car, or hearing its alarm bells. If the verdict imports a finding that the gong was not rung, it stands against the affirmative evidence of many disinterested witnesses, without counter testimony from persons watching and listening for such



signals, so that their attention was so directed that they might, to some extent, prove the negative. (*Foley v. N. Y. C. & H. R. R. Co.*, 197 N. Y. 430.) The Highway Law (Consol. Laws, chap. 25; Laws of 1909, chap. 30), section 332, declaring as the rule of the road that vehicles turn to the right of the center, does not apply to such a street railroad. (*Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295.)

The judgment and order should be reversed and the complaint dismissed, with costs.

JENKS, P. J., THOMAS, MILLS and PUTNAM, JJ., concurred; RICH, J., voted for a new trial.

Judgment and order reversed and complaint dismissed, with costs. Order to be settled before Mr. Justice PUTNAM.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. MAX GLICK, Respondent, v. ALFRED P. RUSSELL, as County Treasurer of Dutchess County, and HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, Appellants.

Second Department, December 14, 1917.

**Intoxicating liquors — reduction of number of certificates issued in municipalities under 55,000 population — when determination of local commissioners conclusive — contrary determination by State Excise Commissioner.**

Where two of the three commissioners appointed, under the authority of chapter 623 of the Laws of 1917, by the mayor of a city of a population less than 55,000 to reduce the number of liquor tax certificates so that there shall be only one certificate to each 500 of the population and to determine what persons are and what persons are not to be entitled to the issuance of certificates for the ensuing year, have filed a written determination of these questions, a person certified as being entitled to a certificate is entitled to the issuance thereof although the State Commissioner of Excise has made a different determination as to the persons entitled to certificates, upon the ground that the designations of the local commissioners were ineffective not being signed by the third commissioner, who made a dissenting and independent determination. Unanimity in a commission of three persons is not ordinarily required.

App. Div.]

Second Department, December, 1917.

The determination of the local commissioners need not affirmatively show that a meeting was duly held upon reasonable notice to all members of the commission, for it is presumed that the local commission performed its statutory duty.

APPEAL by the defendants, Alfred P. Russell, as County Treasurer of Dutchess county, and another, from an order of the Supreme Court, made at the Dutchess Special Term and entered in the office of the clerk of the county of Dutchess on the 29th day of September, 1917, granting the application of the relator for the issuance of a liquor tax certificate.

*C. S. Ferris*, for the appellants.

*James G. Meyer*, for the respondent.

STAPLETON, J.:

This is an appeal from a final order in a proceeding instituted under subdivision 1 of section 27 of the Liquor Tax Law (Laws of 1909, chap. 39, constituting Consol. Laws, chap. 34), commanding the county treasurer of the county of Dutchess to issue a liquor tax certificate to the relator.

The Liquor Tax Law, as amended by chapter 623 of the Laws of 1917, exposes a legislative intent to reduce the number of liquor tax certificates to be issued after October 1, 1917, in cities having a population of 55,000 or less, and in towns: The reduction was directed to be made upon the basis of not more than one certificate to each 500 of the population. (§ 8, subd. 9, ¶ c, cl. (7).) The statute provides that within twenty days after the act takes effect the mayor of each city having a population of 55,000 or less, as shown by the last State census, shall appoint a commission of three persons; that the names of the members of the commission shall be submitted to the Commissioner of Excise for approval or disapproval; and in the event that any member of such commission is disapproved by such Commissioner, he may appoint another person to serve. After approval, and within ten days after notification of their appointment, the members of such commission shall meet, at a time and place to be designated by the Commissioner of Excise, and shall organize by the election of one member as chairman of the commission. The commission have power to appoint a clerk. (Liquor Tax

Law, § 8, subd. 9, ¶ c, cls. (1), (2).) The commission is directed to investigate as to the location of places within such city where trafficking in liquors is engaged in under liquor tax certificates issued under subdivision 1 of section 8 of the Liquor Tax Law, and they are empowered to inquire as to the conduct of the business at those places. "Upon the completion of such investigation and inquiry, which shall be on or before September first, nineteen hundred and seventeen, the said commission shall determine as to the places within such city or town, not exceeding the ratio of one for each five hundred of the population thereof, where trafficking in liquors may be continued during the ensuing year, beginning October first, nineteen hundred and seventeen, under liquor tax certificates issued under subdivision one of this section.

\* \* \* The said commission shall prepare a written statement containing a description of the places where such trafficking in liquors may be continued, giving the street and number, if any, and the names of the holders of the liquor tax certificates under which such trafficking was engaged in at the time of the investigation. Such statement shall also contain a like description of the places where trafficking in liquors is engaged in, for which liquor tax certificates are not to be issued for the ensuing year in order to reduce the number of places where trafficking in liquors may be engaged in under such subdivision to the ratio herein prescribed. Such statement shall be signed in triplicate by the members of the commission, one of which triplicates shall be filed with the State Commissioner of Excise, one with the certificate issuing officer of the county in which such city or town is situated, and one in the office of the clerk of the city or of the town clerk of the town." (Liquor Tax Law, § 8, subd. 9, ¶ c, cl. (3).)

"The determination of such commission shall be final and conclusive. In case such commission shall fail to designate on or before September first, nineteen hundred and seventeen, the places in such city or town for which liquor tax certificates may be issued, or in case the mayor of a city or the town board of a town refuses or fails to appoint such commissioners, or if for any other cause such designation is not made, the State Commissioner of Excise shall designate said places." (Liquor Tax Law, § 8, subd. 9, ¶ c, cl. (4).)

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The population of the city of Beacon, according to the last State census, is 10,165. The city is entitled to twenty places for which subdivision 1 liquor tax certificates may be issued for the excise year commencing October 1, 1917. For the excise year of 1916, *i. e.*, October 1, 1916, to September 30, 1917, both dates inclusive, there were forty-one subdivision 1 certificates issued and in force. Therefore, the excise commission appointed by the mayor of the city of Beacon was required to designate twenty places for which subdivision 1 certificates may be issued for the excise year beginning October 1, 1917, and it was also required to designate twenty-one places for which subdivision 1 certificates may not be issued for that excise year.

The mayor of the city of Beacon appointed John S. Lynch, Daniel R. Sullivan and George F. Patterson. Two of the commissioners (Lynch and Sullivan) made and signed a designation of places dated August 31, 1917, and filed the same on September 1, 1917. The third commissioner refused to concur in or to sign the designation signed by Messrs. Lynch and Sullivan. He signed an independent designation and statement and filed it on September 4, 1917.

The State Commissioner of Excise, made a party to this proceeding, professing to regard as ineffective the designation and determination of the local commission, made and filed a designation and statement of places on the 15th day of September, 1917. The relator's premises were designated by the local commission and were not designated by the State Commissioner. The relator applied to the county treasurer of Dutchess county for a liquor tax certificate, and the county treasurer denied the application, stating his reasons therefor in writing as follows: "Acceptance of within application statement and accompanying bond for filing in this office refused, and application for liquor tax certificate refused upon the ground that the premises at which the applicant intends to traffic in liquors is not entitled to a liquor tax certificate for the term beginning Oct. 1, 1917, under the determination of Herbert S. Sisson, State Commissioner of Excise, dated Sept. 15, 1917, and filed in this office Sept. 17, 1917."

The facts hereinbefore recited are undisputed. There is no allegation in the return, and there is no claim made, that

there was any other reason than that stated in writing for the refusal of the certificate to the relator. There is no allegation in the return that the commission did not duly hold a meeting upon reasonable notice to all of its members and then and there deliberate and determine.

It is made a point in the brief that the written statement which the statute required the commission to prepare did not expressly state that a meeting had been duly held upon reasonable notice to all of the members of the commission, and that at such meeting the determination and designation were made; but on the argument that contention was withdrawn in order that the real question of law presented by this appeal might be determined without the consideration of a subsidiary and quite unimportant circumstance. The concession was in harmony with the regularity of the proceedings of the local commission, as may be inferred from the language of the so-called minority report, unseasonably made and filed, and was doubtless impelled by a disinclination to take advantage of a blank form obviously prepared under the direction of the State Commissioner of Excise. Moreover, this is not a case where the statute writes the form of statement or requires that jurisdictional facts be certified. It requires simply a ministerial statement of certain specified facts, to wit, a description of the places where such trafficking in liquors may be continued, giving the street and number, if any, and the names of the holders of the liquor tax certificates under which such trafficking was engaged in at the time of the investigation, and a like description of the places where trafficking in liquors was engaged in for which liquor tax certificates are not to be issued for the ensuing year. That the local commission performed its statutory duty is to be presumed. (*Downing v. Rugar*, 21 Wend. 178; *Albany County Savings Bank v. McCarty*, 149 N. Y. 71, 83.)

The real contention of the appellant is that the statement required by the statute, the provisions of which are hereinbefore quoted, is void unless signed by all three commissioners. The statute does not say so. It could have said so by the use of the simple word "all." Unanimity in a commission of three persons is not ordinarily required. Statutes are to be

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interpreted workably. (*People ex rel. Washington v. Nichols*, 52 N. Y. 478.)

The order should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., THOMAS, RICH and BLACKMAR, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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CATHARINE LAUFFER, Respondent, v. THOMAS DOWNES, Appellant.

Second Department, December 7, 1917.

**False imprisonment — arrest of woman in city of New York without warrant on charge of solicitation — defendant must show that plaintiff was guilty and that offense was committed in his presence — judgment for plaintiff affirmed.**

Where a police officer arrested a woman in the city of New York without judicial warrant for an alleged violation of section 1458 of the Consolidation Act (Laws of 1882, chap. 410), which makes solicitation on a public thoroughfare disorderly conduct tending to a breach of the peace, he must, in order to escape liability when subsequently sued for false imprisonment after the discharge of the plaintiff, establish, *first*, that the plaintiff was guilty of the offense, and *second*, that the offense was committed in his presence or within his view.

Evidence examined, and *held*, that the jury were justified in finding that the plaintiff was unlawfully imprisoned and detained and that a judgment in her favor should be affirmed.

PUTNAM, J., and JENKS, P. J., dissented, with opinion.

APPEAL by the defendant, Thomas Downes, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 14th day of December, 1916, upon the verdict of a jury for \$300, and also from an order entered in said clerk's office on the 3d day of January, 1917, denying defendant's motion for a new trial made upon the minutes.

George A. Green [*Lamar Hardy, Corporation Counsel*, and *Thomas F. Magner* with him on the brief], for the appellant.

Charles A. Oberwager [*Benjamin Krauss* with him on the brief], for the respondent.

STAPLETON, J.:

The appeal is from plaintiff's judgment in an action for damages for false imprisonment. The defendant is an officer of the police force of the city of New York. He arrested the plaintiff without a judicial warrant. She was detained until her arraignment before a city magistrate on the day following her arrest. The officer says he arrested her because she solicited him on a public street at ten-thirty o'clock in the evening and offered to prostitute herself for money. He charged her with a violation of section 1458 of chapter 410 of the Laws of 1882 (Consolidation Act), continued in force and its operation extended territorially by the Greater New York charter (Laws of 1897, chap. 378, §§ 1608, 1609, 1610, as amd. by Laws of 1901, chap. 466). The pertinent provisions of the Consolidation Act read:

" § 1458. Every person in said city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place in said city and county commit any of the following offenses, that is to say: \* \* \*

" 2. Every common prostitute or nightwalker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passers-by."

The plaintiff herein was convicted in the proceeding of a criminal nature by a city magistrate, but the conviction was reversed and the defendant discharged by the County Court of Kings county on the ground that the evidence did not warrant a conviction. (Code Crim. Proc. §§ 764, 767.) The plaintiff then commenced this action. The defendant pleaded justification as a defense. The plaintiff gave evidence that she did not commit the acts alleged in the information and that she was arrested and detained. The defendant was not fortified by a judicial warrant nor by a valid and subsisting judgment of a court having jurisdiction of the offense with the commission of which he charged the plaintiff. He was remitted to reliance upon a statute for his warrant, and he can have protection only by establishing that the person he arrested and detained was found violating the law in his presence or within his view. (*Davis v. American Society, etc.*,

75 N. Y. 362, 367.) The statute reads: "The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody, any person who shall commit, or threaten, or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by act of the Legislature, or by any ordinance made by lawful authority. The members of the police force shall possess in The City of New York and in every part of this State, all the common law and statutory powers of constables, except for the service of civil process, and any warrant for search or arrest, issued by any magistrate of this State, may be executed, in any part thereof, by any member of the police force, and all the provisions of sections seven, eight and nine of chapter two, title two, part four of the Revised Statutes, in relation to the giving and taking of bail, shall apply to this chapter." (Greater N. Y. Charter, § 337, as amd. by Laws of 1901, chap. 466.)

In *Snead v. Bonnoil* (166 N. Y. 325, 328) the court say: "If the arrest was lacking in these elements of authority to make it, then there has been an unlawful detention of the person arrested and, upon his bringing his action and showing the false imprisonment, the burden of justification is upon the defendant." The court further say: "False imprisonment has been well defined to be a trespass committed by one man against the person of another, by unlawfully arresting him and detaining him without any legal authority. (Addison on Torts, p. 552.) Where the detention is illegal the action will lie, without regard to the innocence of the defendant in his intentions. It is an important principle of our political institutions that every person is entitled to immunity from arrest except by authority and for cause."

Assuming, without deciding, that the acts alleged to have been committed by plaintiff, on the night of her arrest by the defendant, brought her within the terms of the hereinbefore quoted provisions of chapter 410 of the Laws of 1882, and those acts constitute a breach of the peace or are directly prohibited by that statute, even a police officer, justifying by statutory warrant and not supported by a final judgment of conviction in a court having jurisdiction of the offense, must, in an action for false imprisonment, establish two facts:



(1) The guilt of the plaintiff of an offense for which he may make an arrest without judicial warrant, and (2) that the offense was committed in his presence or within his view. (*Snead v. Bonnoil*, *supra*; *Carson v. Dessau*, 142 N. Y. 445, 448; *Gold v. Armer*, 140 App. Div. 73; *Hennessy v. Connolly*, 13 Hun, 174; *Boyleston v. Kerr*, 2 Daly, 220; *Sternack v. Brooks*, 7 id. 142; *People ex rel. Kingsley v. Pratt*, 22 Hun, 300.)

The jury in the case at bar, acting within its lawful province, found that the plaintiff was unlawfully imprisoned and detained. Its verdict should stand and the judgment entered thereon should be affirmed.

THOMAS and BLACKMAR, JJ., concurred; PUTNAM, J., read for reversal, with whom JENKS, P. J., concurred.

PUTNAM, J. (dissenting):

This recovery is for damages in discharge of a duty laid on a policeman by the city charter. Suspicion was not only aroused by seeing plaintiff accost three different men that evening, but the officer in plain clothes was himself solicited. Therefore, he needed no warrant, as might be required for a misdemeanor, out of his view. He could not let plaintiff escape because there was no night court for speedy arraignment.

Is such an officer henceforth to fail in his duty in view of the possible impression a woman of good appearance may subsequently make upon a civil jury?

Referring to the Statute of Winchester (13 Edw. I, Stat. 2, c. 4), authorizing arrest of suspicious persons at night, Hawkins' Pleas of the Crown says: "It is holden that this statute was made in affirmance of the common law and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself, as hath been more fully shewn in the precedent chapter, section twenty." (Vol. 2 [8th ed.], p. 129, § 6.)

Authority to arrest with or without process is conferred on a village constable (Village Law [Consol. Laws, chap. 64; Laws of 1909, chap. 64], § 338; Village Law [Gen. Laws, chap. 21; Laws of 1897, chap. 414], § 319, as amd. by Laws of 1899, chap. 217; Village Law [Laws of 1870, chap. 291], tit. 8, § 19.

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See *Roderick v. Whitson*, 51 Hun, 620), and on policemen of a city (N. Y. City Police Courts' Act [Laws of 1860, chap. 508], § 20; re-enacted in Consol. Act [Laws of 1882, chap. 410], § 1458; Greater N. Y. Charter [Laws of 1897, chap. 378; Laws of 1901, chap. 466], §§ 311, 315, as amd. by Laws of 1914, chap. 455; Id. § 337).

I find no controlling authority for this affirmance. In *Carson v. Dessau*, cited, the defendant was not an officer. The court expressly reserved the question "whether or not the officer was liable" (p. 448). The other Court of Appeals authority, *Snead v. Bonnoil*, a charge of felony, turned on defendant's belief that a felony had been committed. On the other hand, an instruction "the policeman was liable unless the plaintiff was guilty" (in line with the opinion of the majority here) was held error. (*Schultz v. Greenwood Cemetery*, 190 N. Y. 276, 282.)

JENKS, P. J., concurred.

Judgment and order affirmed, with costs.

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RACHEL BRENNER, Appellant, v. LANDSMANN COMPANY,  
Respondent.

First Department, January 18, 1918.

**Negligence — injury caused by defective stairway — evidence — condition of step after accident — proof raising question of fact as to negligence of owner of building — contributory negligence for jury — notice of defective condition given to tenant.**

Where a plaintiff, who fell down a stairway owing to the fact that her heel caught in a crack in one of the steps, sues the owner of the building, who had control of the hallways and stairways, to recover for personal injuries received, it was error for the court to refuse to allow the plaintiff to show the condition of the step by the testimony of her son who examined it shortly after the accident on the same night.

So too, it was error to dismiss the complaint where the plaintiff had given evidence to the effect that she received said injury when descending the stairway, which was unlighted, after a call upon a friend who was a tenant of an upper apartment used for residential purposes and that the defend-

ant retained control of the stairway and was under duty to make repairs and that three months before the accident the plaintiff, when making a similar call, observed the crack in the step and that the edge thereof was worn. Such testimony was sufficient to take the case to the jury on the question of the common-law liability of the defendant, there being no claim under the statute.

On such evidence it cannot be said that the plaintiff was guilty of contributory negligence as a matter of law and the jury would have been justified in finding that she exercised proper care.

As the defendant employed no janitor but made inspections of the building by its president, and the tenants were required to notify the defendant if repairs were needed, it was error to exclude evidence that the plaintiff drew the attention of the tenant upon whom she called to the condition of the step three months before the accident.

APPEAL by the plaintiff, Rachel Brenner, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 12th day of April, 1917, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

*Lawrence B. Cohen* of counsel [*Louis P. Brown* and *Jacob Shientag* with him on the brief], *Cohen Brothers*, attorneys, for the appellant.

*Reuben Dorfman*, for the respondent.

LAUGHLIN, J.:

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The defendant is a domestic corporation and owns the premises and three-story building known as No. 234 Broome street, borough of Manhattan, New York. The lower floor of the building was rented and occupied as a store and each of the other floors was rented to and occupied by a different tenant for residential purposes.

The president of the defendant testified that he had personal charge of the building; that no janitor was employed; that the building was taken care of to some extent by the defendant and it retained control of the hallways and stairways and it was its duty to make repairs, and it was the duty of the tenants to notify defendant if repairs were needed unless he noticed the necessity for the repairs himself. His

business was next door and he claims to have made frequent inspections of the premises himself. The tenants lighted and paid for lighting the hallways. There was a stairway leading from the ground floor to the next floor, referred to as the first floor, and this was used by both residential tenants and with respect to the first story afforded the only access to their apartments. One Mrs. Leis was the tenant of the first floor above the street. Shortly after six o'clock of the evening of the 6th day of February, 1916, the plaintiff called on Mrs. Leis, who was her friend, and remained about half an hour. On leaving, as she was descending the stairs, she testified, in substance, that she was holding onto the banister with her right hand and that there was a crack in the second step from the top in which her heel caught and that thereupon her hand slipped from the banister and she fell and broke her left arm; that she had called on Mrs. Leis three months before and then observed that the second step was worn at the edge and that the crack in which her heel subsequently hooked was then in it. The plaintiff did not give the dimensions of the crack in the step but she testified that the edge of the step was worn down and that there was a split or crack in it in which her heel caught and that the hall was not lighted. The plaintiff also offered to show the condition of the step by her son who examined it shortly after the accident the same night, but this was excluded by the court and an exception was taken to the ruling. We think the court erred both in excluding that evidence and in dismissing the complaint.

The testimony of the plaintiff was sufficient to take the case to the jury. The jury would have been justified in finding on the testimony of the plaintiff that the step had remained in the same condition for at least three months and that the defendant was, therefore, chargeable with constructive notice of its condition and failed to perform its duty to exercise reasonable care to maintain the steps in a safe condition.

Counsel for the defendant argues that this was not a tenement house within the statute for the reason that it did not contain three or more apartments. (See Tenement House Law [Consol. Laws, chap. 61; Laws of 1909, chap. 99], § 2,

subd. 1, as amd. by Laws of 1912, chap. 13.)\* Liability, however, is not claimed under the statute but under the common law on the ground that the defendant merely rented the apartments, retaining control of the hallways and stairways and, therefore, owed a duty both to the tenants and to those having business with them or calling upon them of reasonable care to maintain the stairway in a suitable state of repair. (*Peters v. Kelly*, 129 App. Div. 290; *Dollard v. Roberts*, 130 N. Y. 269; *Peil v. Reinhart*, 127 id. 381; *Monteith v. Finkbeiner*, 50 N. Y. St. Repr. 453; *Henkel v. Murr*, 31 Hun, 30.) It cannot be said that the plaintiff was guilty of contributory negligence as matter of law and the jury would have been warranted in finding that she exercised proper care. (*Lee v. Ingraham*, 106 App. Div. 167.) The other evidence offered with respect to the condition of the step and excluded might have indicated that the condition had existed for a considerable period of time.

These views require a reversal, but we deem it proper to add that on the evidence in this record the landlord, in effect, constituted the tenants his janitors for the purpose of discovering when repairs to the stairway were necessary, and in that view the court also erroneously excluded evidence offered by the plaintiff to show that on the occasion three months before the accident she drew Mrs. Leis' attention to the condition of the step.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SCOTT, DOWLING and SMITH, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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\* See, also, Laws of 1917, chap. 806.—[R.E.P.]

ANNA C. MAHON, Respondent, v. THE EQUITABLE TRUST COMPANY OF NEW YORK, as Executor of and Trustee under the Last Will and Testament of EDWARD COYNE, Deceased, Appellant.

First Department, January 18, 1918.

**Pleading — action based upon fraud and deceit — complaint not stating cause of action — when remedy of plaintiff is against corporation and not against person who organized same — allegations of fraud without damage resulting therefrom do not state cause of action.**

A complaint which in substance alleges that the plaintiff's father and the defendant's testator conducted a certain hotel as partners and that the plaintiff and her sister succeeded to a one-half interest in the hotel property by the death of their father and mother, and that the defendant subsequently organized a corporation to which he sold the hotel property and falsely represented to the plaintiff that the value of the property was much less than the sum received therefor, etc., and that the plaintiff, relying on said false representation, accepted with her sister a sum of money which did not represent their real interest in the property, and that the plaintiff only discovered the fraud on the dissolution of the corporation, which made no accounting, etc., does not state a cause of action against the defendant in that no damages are alleged and the moneys in which the plaintiff claims to have an interest belong to the corporation, not to the defendant, and her remedy is against it.

Mere allegations of fraud and deceit without damages flowing therefrom do not state a cause of action.

APPEAL by the defendant, The Equitable Trust Company of New York, as executor and trustee, from an order of the Supreme Court, as resettled, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of October, 1917, overruling defendant's demurrer to the complaint.

*John Delahunty*, for the appellant.

*William D. McNulty*, for the respondent.

LAUGHLIN, J.:

The demurrer was interposed on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

The plaintiff alleges, in effect; that her father and defendant's testator Coyne owned the New Amsterdam Hotel on Fourth avenue, borough of Manhattan, N. Y., and the furniture and all personal property connected therewith, and conducted the hotel as partners; that her father died March 4, 1900, leaving a will by which he gave all his personal property and the income from the realty to his widow; that the widow and the deceased Coyne formed a partnership December 12, 1901, to continue the business and continued it until her death, intestate, on the 27th of May, 1909; that plaintiff and her sister, Mary H., were the only heirs at law and next of kin of their mother and succeeded to her interest in the copartnership and in the personal property and thereupon came into possession of an undivided one-half interest in the realty constituting the hotel property; that by the copartnership between Coyne and plaintiff's mother either was entitled to draw \$50 a week but that Coyne did not let plaintiff draw anything after her mother's death and made no statement to plaintiff or to her sister with respect to the receipts, disbursements or profits of the hotel business, and falsely represented that there were no profits; that plaintiff and her sister being young and inexperienced relied on Coyne; that in January, 1911, he organized a corporation known as the "Edward Coyne Hotel Company" with a capital of \$10,000 and the corporation took over the real and personal property constituting the hotel property which was then worth, over and above incumbrances, \$150,000; that Coyne was president and treasurer of the hotel company and that in the name of the company he mortgaged the property for \$45,000 for which he has not accounted to plaintiff and that he has not accounted to her for any money; that Coyne continued to manage the hotel without reporting to or advising with plaintiff, and on the 1st of December, 1911, sold it, realizing \$92,500 over and above the mortgages and that about the same time he sold the furniture for \$5,000; that on the 13th of December, 1911, Coyne informed plaintiff and her sister that their joint interest in all the property was \$27,500, which was known to him to be false and was made with intent to deceive plaintiff and her sister and that they were deceived thereby, and that relying upon his representations they

accepted \$27,500 as their share and that plaintiff did not discover the falsity of the representations until October, 1916; that the hotel company was dissolved, but that no accounting by it or its officers has ever been made or filed showing assets, debts or distribution. Plaintiff then demands judgment for \$21,875 which is the aggregate of one-fourth of the mortgage for \$45,000, one-fourth of the net proceeds of \$92,500 on the sale of the hotel, and one-fourth of the \$5,000 realized on the sale of the furniture.

Doubtless plaintiff would have an action against Coyne for an accounting until the organization of the corporation, but her attorney disclaims any such theory of liability, and manifestly the sister would be a necessary party thereto if that were its object. The attorney for the plaintiff insists that this is an action for damages for fraud and deceit; but no damages were shown and on the facts alleged all of the moneys in which plaintiff claims an interest belonged to the corporation, and if she has not received her full share her remedy is against the corporation. The plaintiff, on the facts alleged, must receive her share through the corporation. If, on the facts alleged, there was any liability on Coyne's part after the organization of the corporation it was to the corporation and enforceable by it alone. The plaintiff does not even allege that the corporation was insolvent. If Coyne received any money which belonged to the plaintiff, his executor could be called to account therefor and the plaintiff might recover it as for money had and received; but that is not alleged and the action is not brought on that theory. On the facts alleged the only capacity in which Coyne had a right to receive the money was as an officer and representative of the corporation and there is no appropriate allegation to show that he received it in any other capacity or that he appropriated it to his own use. If it be true that the share of the plaintiff and her sister was more than Coyne represented it to be, no damages are shown to have been caused thereby, for on the facts alleged their claims would still be good against the corporation or its trustees. It is fairly to be inferred, although not so alleged, that when the interests of plaintiff and her sister in the property were conveyed and assigned to the



corporation they became stockholders. Mere allegations of fraud and deceit without damages flowing therefrom do not constitute a cause of action. (*Proctor v. Brown*, 177 App. Div. 722.) There is no allegation that plaintiff parted with any consideration on Coyne's representation with respect to the amount to which she and her sister were entitled. It is not alleged that plaintiff on the strength of said representations released the corporation or anybody from liability to her for any greater amount.

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and demurrer sustained with leave to plaintiff to plead over on payment of said costs within twenty days.

CLARKE, P. J., SCOTT, DOWLING and SMITH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to plaintiff to serve an amended complaint on payment of said costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK RAILWAYS COMPANY and FRANK L. HALL and Others, as Bondholders, etc., Relators, v. THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT and EDWARD E. MCCALL and Others, as Commissioners Thereof, Respondents.

First Department, January 18, 1918.

**Public Service Commissions Law — street railroads — reorganization — authority of Commission to order street railroad to reserve fund for maintenance and depreciation — authority to issue stock or bonds to provide for depreciation.**

Under section 4 of the Public Service Commissions Law, providing that the Commission shall possess "all powers necessary or proper to enable it to carry out the purposes of this chapter," said Commission, in order to carry out a plan of reorganization of a railway company, having authorized the issue of stocks and bonds and consented to the execution of first

real estate and refunding gold bonds and of adjustment mortgage five per cent income bonds subject to the first real estate and refunding mortgage, both of which provide that the company will keep its roads adequately equipped, etc., may order said company to reserve twenty per cent of its gross operating revenues, month by month, to provide for the maintenance and depreciation of its properties during the month.

Allowance for depreciation and obsolescence is a part of the operating expenses of a corporation.

A corporation has no authority to issue bonds or stock to provide for depreciation and obsolescence.

SCOTT, J., dissented, with opinion.

CERTIORARI issued out of the Supreme Court and attested on the 17th day of April, 1913, directed to the Public Service Commission of the State of New York for the First District and to Edward E. McCall and others, as commissioners thereof, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in directing the relator to set aside twenty per cent of its gross receipts to pay for maintenance and depreciation.

*Richard Reid Rogers* of counsel [*J. Tufton Mason* with him on the brief], *J. L. Quackenbush*, attorney, for the relator New York Railways Company.

*Burt D. Whedon* of counsel [*S. Sidney Smith* with him on the brief], *Wing & Russell*, attorneys, for the relators Hall and others.

*Oliver C. Semple* of counsel [*William L. Ransom*, attorney], for the respondents.

SMITH, J.:

Pursuant to foreclosure decrees of the Circuit Court of the United States the property and franchises of the Metropolitan Street Railway Company were sold to a purchasing committee of bondholders acting under a reorganization plan. Thereafter the purchasers conveyed the property and franchise thus purchased to the New York Railways Company, the relator in this proceeding. This reorganization plan contemplated the formation of the relator company with a capital stock of \$17,500,000 par value, the issuance by said corporation of \$16,768,100 face value of thirty-year first real

estate and refunding mortgage four per cent gold bonds, and of \$31,933,400 face value of thirty-year adjustment mortgage five per cent income gold bonds, subject to the first real estate and refunding mortgage. In respect to the income bonds, the reorganization plan provided that the mortgage securing the same should provide for such method or methods of determining the net income and should be in such form as the said joint committee should prescribe. The adjustment mortgage as thus approved by the joint committee provided for the payment from the net income of the corporation of five per cent interest provided the same should be earned, and provided that the net income should be ascertained by deducting from the gross income "the expenditures actually made *and reserves effectively set apart* as shall be properly chargeable against such gross earnings and income during such period." Both mortgages contained this provision: "At all times the Company will keep its said railroads owned and leased and the railroads of the auxiliary companies adequately equipped with cars and other equipment and rolling stock and will maintain in good order and condition, reasonable wear and tear excepted, all such cars and other equipment and rolling stock, and whenever any such cars or equipment or rolling stock shall be worn out or be destroyed, the Company promptly will cause the same to be replaced by other cars or equipment or rolling stock of at least equal value and capacity, so that at all times the value and capacity of such cars and other equipment shall be fully kept up; and at all times the Company will set apart, use and apply for that purpose so much of the earnings of the property mortgaged and pledged hereunder as may be required for such maintenance and replacement of such equipment subject to the lien hereof." Both mortgages further provided: "The Company will not cause, permit or suffer any auxiliary company to become indebted except for current operating debts incurred in the ordinary course of business, or to issue any evidence of indebtedness to pay or to reimburse any auxiliary company for any outlay for any improvement or extension the cost of which should properly be chargeable as an operating or maintenance expense *or against any fund reserved for maintenance or depreciation.*"

In order to carry out the plan of reorganization the Commission finally made three orders: (1) On January 24, 1912, authorizing the issue of the stocks and bonds; (2) on February 27, 1912, consenting to the execution of the mortgages; (3) on February 27, 1912, requiring, among other things, the company to reserve twenty per cent of its gross operating revenues month by month to provide for maintenance and depreciation of its properties during the month. The last order as to the provision mentioned was confirmed on rehearing by the Commission. It is to review this last order that this proceeding is brought. The order was made upon abundant proof as to the reserve fund necessary for maintenance and depreciation and is not questioned upon that ground. The sole contention of the relator is that whether right or wrong it is the province of the corporation directors and not that of the Commission to determine what amount should be set aside for that purpose.

Preliminarily it is well to note that this order was made in February, 1912. The twenty per cent of the gross income has been set aside as therein required. For the actual maintenance expenses about sixteen and one-half per cent has been required and about three and one-half per cent has been set aside to provide for depreciation and obsolescence. At times upwards of \$3,000,000 has thus accumulated. The relator has been able to pay only three per cent interest upon these income bonds. In pursuance of the reorganization plan these bondholders are entitled for a time to name directors to a number one less than a majority of the board. If the amount of this fund to be reserved for depreciation were left to the directors it is fair to assume that with so large a representation of the income bondholders upon the board the moneys thus reserved would largely be applied to the payment of the interest upon these bonds up to five per cent, and the fund reserved for depreciation would be reduced to a minimum. The amount now reserved is shown by the evidence to be no more than is necessary to take care of depreciation and obsolescence. If the relator's contention be sound these directors can entirely deplete this fund for the payment of this interest until a time comes when such a fund will be necessary to restore the road to a proper standard and there

will be no fund applicable thereto and the Commission charged with the duty to protect the public is powerless to prevent the waste.

In *People ex rel. Binghamton L., H. & P. Co. v. Stevens* (203 N. Y. 7) application was made for leave to issue bonds and preferred stock for the purpose of paying certain promissory notes outstanding and certain floating indebtedness. The Commission granted the permission but conditioned the same upon the corporation charging off upon the books \$100,000 of stock liability appearing thereupon. Upon certiorari the Appellate Division sustained the order. (143 App. Div. 789.) This ruling was reversed by the Court of Appeals, *first*, upon the ground that the Commission was not authorized to condition its assent upon the agreement of the corporation to charge off this liability; and *second*, upon the ground that it did not appear from the evidence that these promissory notes did not represent operating expenses including such a fund as should have been reserved for depreciation and obsolescence. The court there held that the corporation could not properly issue long term bonds for the purpose of paying repairs made necessary by depreciation and obsolescence and that the Commission was not authorized to assent thereto. Extracts from the opinion show clearly the extent of the holding. "The question as to what expenditures are a proper basis for *permanent capitalization* is an important one, always a proper and necessary subject for consideration, not alone by the directors of a corporation, but by any Commission that has authority to grant or withhold its consent to the issue of new stock or bonds which are to become a part of the corporation's permanent capitalization." Again: "We are nevertheless of the opinion that it was the duty of the Commission to determine whether the stock and bonds proposed by the relator were to secure money to pay floating indebtedness incurred in the ordinary running expenses of the corporation. Such determination by the Commission would not be substituting the judgment of the Commission for the judgment of the directors of the company in the management of its affairs at least if the directors of the company had wholly and intentionally ignored the self-evident proposition that except for special and extraordinary circumstances some part of the expenses of renewing

machines and plant originally charged to capital account must be paid as a part of the operating expenses of a corporation from year to year. We refer to the necessity of a corporation providing for some part of the expenses of renewing machinery and plant from year to year as self-evident, because it has been so considered and expressed by the courts in many cases. (*People ex rel. Jamaica Water Supply Company v. Tax Commissioners*, 196 N. Y. 39, 57, 58; S. C., 128 App. Div. 13, 17, 18; *People ex rel. Third Avenue R. R. Co. v. Tax Commissioners*, 136 App. Div. 155, 159; *affd.*, 198 N. Y. 608; *City of Knoxville v. Knoxville Water Company*, 212 U. S. 1.)

"In the *Jamaica Water Supply Company* case this court said: 'We suppose that judicial notice may be taken of the fact that in the conduct of many industrial enterprises there is a constant deterioration of the plant which is not made good by ordinary repairs, which of course, operates continually to lessen the value of the tangible property which it affects. The amount of this depreciation differs in different enterprises, but the annual rate is usually capable of estimate and proof by skilled witnesses. No corporation would be regarded as well conducted which did not make some provision for the necessity of ultimately replacing the property thus suffering deterioration.' (p. 57.)

"In that case in the Appellate Division it was said: 'The net income of a corporation for dividend purposes cannot be determined until all taxes, depreciation, maintenance and up-keep expenditures have been deducted. Otherwise the dividend is not paid from the earnings but by a depreciation of the capital account.'" Again, "In the *Third Avenue Railroad* case it was said: 'The annual ordinary expenditures for repairs, replacements and renewals upon such a property cannot be assumed to make it unnecessary to provide a fund which will replace its engines, electrical equipment and other physical property which at some time must be replaced.' (p. 159.)

"In the *City of Knoxville v. Knoxville Water Co.* case it was said: 'It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the

company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both.’ \* \* \*

“It will not be denied that fuel and such other materials as are consumed from day to day and the labor incurred in daily maintenance should be paid for from the earnings of the corporation as a part of its running expenses prior to the *payment of interest upon bonds* or dividends upon capital stock. A reasonable consideration of the interests of a corporation and the ultimate good of its stock and bondholders, and a regard for the investing public and that fair dealing which should be observed in all business transactions, require that machines and tools paid for and charged to capital account but which necessarily become obsolete or wholly worn out within a period of years after the same are purchased or installed, should be renewed or replaced by setting aside from time to time an adequate amount in the nature of a sinking fund or that by some other system of financing the corporation put upon the purchaser from the corporation the expense not alone of the daily maintenance of the plant but a just proportion of the expense of renewing and replacing that part of the plant which although not daily consumed must necessarily be practically consumed within a given time.”

I have quoted thus fully from the opinion to show, *first*, that the allowance for depreciation and obsolescence must be deemed a part of the operating expenses of a corporation and *secondly*, that a corporation is not authorized to issue bonds or stock to provide therefor, and that the Public Service Commission is not authorized to consent to such an issuance. It is true that the proposition there decided was not the exact proposition here presented but the converse of the proposition is squarely presented. If as there held

new stock or bonds cannot issue to make good depreciation and obsolescence and if as contended by the relator the Commission is not authorized to require a sufficient fund to be set apart to provide for the same the Legislature has wholly failed to accomplish its purpose to provide protection for the investing and traveling public. That this was the purpose of the creation of the Public Service Commission is held by all the authorities. Not only is the issuance of new stock and bonds made subject to the approval of the Commission but explicit power is given to the Commission to provide complete and adequate equipment for the convenience of the traveling public. Section 50 of the Public Service Commissions Law (Consol. Laws, chap. 48; Laws of 1910, chap. 480) gives power to the Commission to order repairs and changes; to order alterations in terminal facilities, in motive power, and equipment; to provide what in its judgment is "adequate service or facilities for the transportation of passengers or property." Under settled rules of statutory interpretation power is impliedly given to take such action as may be necessary to make effective the powers explicitly given to accomplish the purpose of the enactment. But in this case we need not resort to the rule of implied powers for by section 4 of the act it is provided that "There shall be a Public Service Commission for each district, and each Commission shall possess the powers and duties hereinafter specified, *and also all powers necessary or proper to enable it to carry out the purposes of this chapter.*" If this power be denied, the directors are at liberty to divert this fund necessary for the maintenance of the value of the security and also necessary for adequate service to the traveling public to the payment of the interest on these income bonds. When, therefore, in the course of time it becomes necessary to replace obsolescent and depreciated equipment what is the situation created? No fund will have been reserved for that purpose. The Commission is not authorized to assent to the issuance of new securities therefor. The necessary replacement cannot be made for lack of funds and of ability to procure them. The corporation becomes unable to perform its public functions and corporate death is inevitable. Another reorganization becomes necessary with the consequent material impairment



of securities. Even if power existed to raise money for replacements by the issue of new securities the fatal ending is only postponed. If the Legislature has left this loophole in its scheme for the protection of the security holders it has made a serious blunder. Such a fate has befallen too many of these corporations and it was largely to prevent just such catastrophies that this Commission was created. The court should not so construe the powers given as to permit the very evils which the Legislature has sought to remedy. This holding now made does not substitute the judgment of the Commission for that of the board of directors except so far as may be absolutely necessary to provide for the maintenance of the value of the securities and of adequate facilities for transportation by the requirement to pay what is deemed in law "operating expenses" from income, and as I read the statute in view of the purposes of its enactment this authority is there given. The question of the impairment of the obligation of contracts is not here presented *first*, because the contracts were made in view of the existing powers of the Commission, and *secondly*, because the mortgages both contemplate the application of gross receipts to the payment of operating expenses and to "reserves effectively set apart" in which these items are included. While the powers given to the Commission have been in some cases strictly construed, no case has denied to the Commission powers absolutely necessary to accomplish the purposes of its creation.

In my judgment the order was properly made, and the writ of certiorari should be dismissed, and determination of the Commission should be confirmed, with fifty dollars costs and disbursements to respondents.

CLARKE, P. J., PAGE and SHEARN, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

I am unable to concur in the decision about to be made simply because I cannot find in the statute any authority for the order brought up for review. I do not for the purposes of this appeal question the proposition that prudent management of a corporation like the relator requires that some

part of its earnings should be set aside for the establishment of a fund to meet possible future depreciation of plant, nor do I question the power of the Legislature to authorize the Public Service Commission to determine what proportion of the earnings should be so devoted.

The difficulty I find is that the Legislature has not conferred such power. The respondent relies on section 52 of the Public Service Commissions Law, but that section as I read it relates only to the manner of keeping the accounts, and has no reference to the manner in which the income share shall be expended. My brother SMITH finds authority in the Commission to make the order appealed against, in the broad language of section 4 of the Public Service Commissions Law which confers upon the Commission "all powers necessary or proper to enable it to carry out the purposes of this chapter." If the compulsory establishment of a depreciation fund was one of the declared purposes of the act, this clause would undoubtedly authorize the order sought to be reviewed. But the difficulty I find is that it is not one of these declared purposes. It is for this very reason that such extensive, and even minute, authority is given to the Commission with regard to other matters, that I am unable to spell out implied authority to do that which the Commission has undertaken to do here. If the Legislature had desired to invest the Public Service Commission with power to prescribe what amortization funds should be taken out of income, it could have done so very simply and in a few words. That it did not do so is suggestive that it did not intend to confer such power.

Writ dismissed and proceedings affirmed, with fifty dollars costs and disbursements.

STEPHEN H. OLIN and Others, as Executors of and Trustees under the Last Will and Testament of ELIZABETH J. LYNCH, Deceased, Respondents, v. HOWARD THAYER KINGSBURY, Individually and as Sole Surviving Executor of and Trustee under the Last Will and Testament of SAMUEL FROST, Deceased, Appellant.

First Department, January 18, 1918.

**Real property — easements — method of acquisition — evidence — easement of necessity — prescription — adverse user — agreements between landlord and tenant — appeal — inconsistent findings — right of appellant to benefit of finding most favorable to him — estoppel.**

In 1870, Nos. 15, 17 and 19 Irving place, in the city of New York, were separate dwelling houses, leased by their several owners to one tenant who connected the buildings using them as a hotel. In 1881, when the leases expired, Nos. 15 and 17 were leased to the same tenant who used them as a hotel, No. 19 being used as a private dwelling. This continued until 1890 when the three premises were again conducted as a hotel by one tenant and have so remained since that time. The tenant of the three premises has surrendered his lease of Nos. 17 and 19 to the owner and given him permission to erect a partition wall, which would cut off premises No. 15, owned by another party, from premises Nos. 17 and 19. It appears that structural changes can be made to restore No. 15 to the condition in which it was prior to 1870, and that the whole property is capable of being separated into its original units and full enjoyment of a separate use obtained. In a suit by the owner of premises No. 15 against the owner of premises Nos. 17 and 19, evidence examined, and

*Held*, that the owner of No. 15 has acquired no easement in the use of the facilities in Nos. 17 and 19, either by grant express or implied, by estoppel or prescription, nor is said owner entitled to equitable relief preventing the erection of the partition wall.

There must be a reasonable necessity as distinguished from mere convenience in order to establish an easement of necessity.

Except in the case of certain relations that are recognized and enforced in equity, in analogy to the principles of law applicable to easements, an easement can be created only by a grant express or implied, or by prescription, and the latter, as modified by the modern doctrine, rests upon the presumption of a grant.

The modern law of rights acquired by prescription rests upon the adverse user, for which no permission can be shown, for such a length of time that a grant will be presumed, which has been lost. In other words, adverse

user will ripen into an easement, as adverse possession would establish a title and upon the same theory of law.

Although a tenant or succeeding tenants may by adverse use of property for the statutory period create prescriptive rights in adjoining property which will inure to the benefit of their landlord, there is no adverse user by the tenant of a lot when he uses two adjoining lots with the express permission of the owner thereof, and still less is there an adverse use by the tenant of the one lot of the two adjoining lots when any use of the latter was made by the tenant of the one lot under a lease of the other lots which gave him express permission to make such use.

A tenant cannot hold adversely to or prescribe against his landlord.

Where findings are inconsistent an appellant is entitled to the benefit of the one most favorable to him.

Separate agreements by owners of several lots, with a tenant, as to the use thereof, are limited to the term of the agreements and the parties thereto and cannot be extended without a new agreement, nor can they inure to the benefit of any one except the parties thereto, their personal representatives or assigns.

Estoppel can only arise where a person has changed his position with relation to or expended money upon his property, relying upon an existing easement in the adjoining property, and without which the act done or the expenditure would have been useless, and the adjoining owner has not interposed to forbid or prevent it.

In order to fasten a limitation upon the free right which each man has to use his property as he desires, and to convey it free from restrictions, except such as he himself imposes, there must be clear and explicit agreement establishing the other's right showing the intention of the person so permanently to burden his property.

SCOTT, J., dissented, with opinion.

APPEAL by the defendant, Howard Thayer Kingsbury, individually and as executor and trustee, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 17th day of October, 1917, upon the decision of the court after a trial at the New York Special Term.

The judgment restrained the defendant from separating premises No. 15 Irving place in the city of New York from premises Nos. 17 and 19 Irving place.

*Howard Thayer Kingsbury* of counsel [*Frederic R. Coudert* with him on the brief], *Coudert Brothers*, attorneys, for the appellant.

*Stephen H. Olin* of counsel [*John C. Clark* with him on the brief], *William G. Murphy, Jr.*, attorney, for the respondents.

PAGE, J.:

In 1870, Nos. 15, 17 and 19 Irving place were separate dwelling houses and were at that time leased by their several owners to one Wehrle, who connected the buildings, using them as a hotel. When the leases expired in 1881, premises Nos. 15 and 17 were leased to the same lessees, who used the two as a hotel, premises No. 19 being used as a private dwelling. This continued until 1890, when the three premises were again united in one tenant and conducted as a hotel, and have been so conducted to the present date.

The plaintiffs are owners of premises No. 15 Irving place and the defendant is owner of premises Nos. 17 and 19 Irving place. The tenant of these three premises surrendered his lease of premises Nos. 17 and 19 to the defendant and gave him permission to erect a partition wall which would cut off premises No. 15 from premises Nos. 17 and 19.

The Special Term decided that the plaintiffs were entitled to an injunction on the ground that there had arisen an easement by necessity, and while the physical destruction of the property or a substantial change in it so that it could not subserve its original purpose would terminate the easement, the easement attaching to the buildings and not to the soil, there was not sufficient evidence that the buildings were at the present time unsuited for hotel purposes.

The court has found that the facilities of premises Nos. 17 and 19 are essential to the enjoyment of premises No. 15, saying: "If a partition wall should be put on the dividing line between Nos. 15 and 17, as is threatened by the defendant, the house on No. 15 would occupy the whole lot, would have no front entrance or hallway, no elevator or kitchen range, or kitchen chimney or heating plant or water supply or electric light."

"The elevator, heating plant, ranges, boilers, kitchen flue, electric meter, pump and hot water tank and other fixtures and the use of the public rooms and hallway contained in Nos. 17 and 19 [are] necessary to the reasonable enjoyment of No. 15."

These facts are insufficient to establish an easement of necessity, even if the other essentials to the creating of an easement had been present. Structural changes that would

restore No. 15 to the condition it was in prior to 1870 can be made. These may be costly, but the property can nevertheless be put to any reasonable use of which it is susceptible, and its use fully enjoyed without imposing any easement or burden on the defendant's land. "While absolute physical necessity need not be shown, as in the case of land-locked premises, or the support of a wall, there must be a reasonable necessity, as distinguished from mere convenience." (*Wells v. Garbutt*, 132 N. Y. 430, 438; *Ogden v. Jennings*, 62 id. 526, 531. See, also, *Bauman v. Wagner*, 146 App. Div. 191, 195; *Scrymser v. Phelps*, 33 Hun, 474; *Hill v. Bernheimer*, 78 Misc. Rep. 472.) That this property is capable of being separated into its original units, and full enjoyment of a separate use obtained, has been demonstrated. In 1881, as has been stated, No. 19 was separately occupied as a private dwelling after eleven years of use in connection with the other buildings as a hotel. It would undoubtedly be more convenient for the owner of No. 15 to have the property continued to be used in connection with Nos. 17 and 19, but no necessity for such use has been shown.

No easement exists in this case. Except in the case of certain relations that are recognized and enforced in equity, in analogy to the principles of law applicable to easements, an easement can be created only by a grant express or implied, or by prescription, and the latter, as modified by the modern doctrine, rests upon the presumption of a grant. In the case at bar there was never a grant from an owner of either parcel to the other, nor was the property at any time used by a common owner of the fee for hotel purposes.

The cases relied on by the respondents and those cited by Mr. Justice SCOTT may be divided into two classes: *First*, where an owner of land has, by an artificial arrangement prior to a severance, effected an advantage to one portion, to the burdening of the other, upon the severance of the ownership the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance; *second*, where an easement has been established by prescription. In the first class are the following: *Humphries v. Brogden* (12 Q. B. 739); *Doe v. Morrell* (J. Smith [N. H.], 255); *Adams v.*

*Marshall* (138 Mass. 228); *Thompson v. Miner* (30 Iowa, 386); *Kane v. Templin* (158 id. 24); *Teachout v. Capital Lodge of Independent Order of Odd Fellows* (128 id. 380); *Powers v. Heffernan* (233 Ill. 597); *Foote v. Yarlott* (238 id. 54); *John Hancock Mutual Life Insurance Co. v. Patterson* (103 Ind. 582); *Lead City Miners' Union v. Moyer* (235 Fed. Rep. 376). In *Humphries v. Brogden* (*supra*) the case involved the right of support of a house on the surface from impairment by the operation of a mine. The statement of CAMPBELL, Ch. J., as to the right to support of an upper story of a building by the lower story was dicta. He said: "If the owner of an entire house conveying away the lower story only is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface" (p. 747). Thus demonstrating that the principle which controlled that decision was an implied reservation in the grant from a common owner. In *Doe v. Morrell* (*supra*) the house had been erected as one building by the owner of the entire plot. A portion of the land and one-half of the building were sold under execution upon a judgment. It was held, on this severance of ownership, an easement in that portion of the entry, hallway, stairs and chimney, extending beyond the middle line, resulted in favor of the owner of the other half of the house. *Adams v. Marshall* (*supra*): The common owner devised two parcels in severalty, the dividing line running through a portion of a barn. The court held that an easement of support and shelter resulted so that one owner could not tear down his portion of the barn without furnishing an equivalent support. The court said, however: "The defendant, we have no doubt, could have lawfully erected a partition through the barn upon his line" (p. 238). In *Thompson v. Miner* (*supra*) tenants in common built a building covering the entire premises (consisting of three lots) and having a stairway and hall leading to the upper floors, and in pursuance of an agreement entered into before the building was erected, for the purpose of partitioning the property, one conveyed his interest in two of the lots, and the others conveyed their interest in the one lot to him. Held, this

created an easement of the stairways and halls that were appurtenant to each and all of the lots. Thus this is an easement of implied reservation on the conveyance of a common ownership. In *Kane v. Templin* (*supra*) the halves of a building were devised to separate persons. Held, that the two devisees took as purchasers, and that there was an easement by implication in favor of that portion of the building in which there were no stairs or hallway to the use of those that existed in the other portion. The case of *Teachout v. Capital Lodge of Independent Order of Odd Fellows* (*supra*) was where there was an express reservation in the grant from the common owner of a right to use the stairways. *Powers v. Heffernan* (*supra*): Easement in use of halls and stairways created by implied reservation in grant from common owner. In *Foot v. Yarlott* (*supra*), after making separate mortgages on two lots, upon which were erected two buildings, the common owner established a heating plant in one for the use of both. On severance of ownership, by decree of foreclosure, it was held that there was created an easement for the beneficial use of the heating plant. In *John Hancock Mutual Life Insurance Co. v. Patterson* (*supra*) there was an implied reservation of an easement in a grant from the common owner, which was also the case in *Lead City Miners' Union v. Moyer* (*supra*). It thus appears that none of the cases above which are cited by the respondents are authorities tending to sustain their position in the case at bar, for here the element of a grant from a common owner is lacking.

Many cases are cited by the respondents where an easement has been acquired over adjoining property by prescription. No purpose will be served by reviewing them in detail. The modern law of rights acquired by prescription rests upon the adverse user, for which no permission can be shown, for such a length of time that a grant will be presumed, which has been lost. In other words, adverse user will ripen into an easement, as adverse possession would establish a title and upon the same theory of law. It also follows that if the use is exercised by permission, no matter how long the use may be, it cannot ripen into a permanent right; for, as was said by Judge COWEN, "It is well known that a single lisp of



acknowledgment by the defendant, that he claims no title, fastens a character upon his possession which makes it unavailable for ages. No matter that \* \* \* he and those under whom he claims may have holden peaceably, and without the hindrance, molestation or even claim of the owner. *Non constat*, that the whole may not have been as lessee or by comity, until the owner shall reach the time when for purposes which remained suspended on account of the mere inconvenience of his neighbor, he comes in for the enjoyment of his conceded rights." (*Colvin v. Burnet*, 17 Wend. 564, 568.) The reason for this is clear. If a known right to use the property exists, the user is presumed to be in the exercise of that right, and no other grant of right can be presumed.

This brings us to the question whether the plaintiffs, owners of lot No. 15, have acquired an easement by prescription against the defendant owner of lots Nos. 17 and 19. It is true that a tenant or succeeding tenants might by adverse use of property for the statutory period create prescriptive rights in adjoining property which would inure to the benefit of their landlord, but there is clearly no adverse user by the tenant of lot No. 15 when he uses the adjoining premises, lots Nos. 17 and 19, with the express permission of the owner thereof; and still less is there an adverse use by the tenant of lot No. 15 of premises Nos. 17 and 19 when any use of premises Nos. 17 and 19 was made by the tenant of lot No. 15 under a lease of premises Nos. 17 and 19 which gave him express permission to make the use of it that was made. The latter is true, because a tenant cannot hold adversely to or prescribe against his landlord. (*Jones v. Reilly*, 174 N. Y. 97.) It should be noted in this connection that the court made the following finding in its decision: "All these structural changes were made by the tenants only and under an express permission contained in the several leases of the respective parcels and became the property of the respective owners under the terms of such leases. No alterations or additions were made by the owners or either of them."

There were none of the elements in this case from which an easement by agreement might be predicated.

There was no direct evidence of an agreement between the owners in regard to the use of the premises as a hotel, and an agreement could be established only by inference. In

this connection the following findings of fact made by the court should be noticed:

" 33. There was an agreement between the plaintiffs and the defendant and between the plaintiffs and the defendant's predecessors that the building upon the said three lots should be used as a hotel."

" 37. The respective owners of No. 15 on the one hand and of Nos. 17 and 19 on the other, have at no time acted conjointly in regard to the property, or entered into any agreement with each other in respect to its joint or combined use or otherwise, but each owner has at all times dealt separately and independently with his own property and with the tenant or tenants thereof."

Since these findings are inconsistent, the defendant appellant is entitled to the benefit of "37," the one most favorable to him. (*Whalen v. Stuart*, 194 N. Y. 495; *Kinney v. Kinney*, 221 id. 133.) Aside from this, there is no evidence tending to sustain the first. The only agreements that were made were the separate agreements with the tenant by each landlord that the tenant could use the demised premises for a hotel in connection with the other premises. This agreement would be limited to the term of the lease, and the parties thereto. It cannot be extended beyond the term without a new agreement, nor could it inure to the benefit of any one except the parties thereto, their personal representatives or assigns.

Lastly, the plaintiffs claim that they have acquired an easement by estoppel. But estoppel can only arise where a person has changed his position with relation to, or expended money, upon his property, relying upon an existing easement in the adjoining property, and without which the act done or the expenditure would have been useless, and the adjoining owner has not interposed to forbid or prevent it. In such cases equity has interposed and enjoined the adjoining owner from interrupting the enjoyment of the easement. The necessary elements to establish such an estoppel are lacking in this case. First, the owner of No. 15 has not changed his position, relying upon the joint use of the property with Nos. 17 and 19. The leases by both owners were coterminous and were merely a permission of the tenant to so use the property during the period of the lease. Neither made any

alteration in the premises or expended any money thereon. Such changes as were made were the act of the tenant for his more convenient use of the premises, and were done with the separate consent of each owner and related to the use of his own premises. It was limited by the terms of the lease, and there was no agreement express or implied that the owner should continue such use after the term of the lease, or so long as each expressed this consent, with like limitations, by a renewal thereof. The plaintiffs rely upon the case of *Fronckowiak v. Platek* (152 App. Div. 301), which is clearly distinguishable from the instant case and comes clearly within the general rule above stated. In that case a husband and wife purchased property in 1881 upon which they erected an addition to the building. Connected with this addition were sheds and outbuildings. These buildings were all used together and occupied continuously by them until the death of the husband intestate in 1906, and thereafter by the wife until her death in 1910. "The wife equally with the husband contributed to the cost of erecting these additions. With him she paid the taxes on this twenty-foot strip. They were acting for the mutual benefit of the two lots. She was willing to contribute to the building and maintenance of these additions, and he was willing that they should be appurtenant to the main premises. If the situation were presented between the husband and the wife, he would at this late day be estopped to repudiate his affirmative acts in affixing these buildings to the store and dwelling on the lot they owned as tenants by the entirety." (p. 303.)

In my opinion it is clear that the plaintiffs, as the owners of No. 15, have acquired no easement in the use of the facilities in Nos. 17 and 19 either by grant, express or implied, by estoppel, or prescription. It only remains to be considered whether the plaintiffs, while not entitled to relief in damages in a court of law, have nevertheless acquired such rights under purely equitable consideration that a court of equity might interpose injunctive relief. No such right is claimed by respondents, but Mr. Justice SCOTT seems to be impressed with the idea that the long-continued use of this property as a hotel has given the plaintiffs a claim to equitable consideration. It is not necessary to cite authorities for the

familiar situation that arises when the several owners of a tract of land, or upon the same street, agree with each other that only a certain class of buildings shall be erected thereon, or that certain businesses or trades shall not be permitted to be carried on, or that the houses to be built shall not be built within a specified distance of the street; and equity will intervene to prevent a violation of such an agreement, even by subsequent owners, although there is neither privity of contract nor of estate between the one seeking the injunction and those who attempt to appropriate the property in contravention of the use or mode of enjoyment impressed upon it by the agreement of which they had notice. But to fasten a limitation upon the free right that each man has to use his property as he desires and to convey it free from restrictions except such as he himself imposes, there must be a clear and explicit agreement establishing the other's right and showing the intention of the person so permanently to burden his property. No such agreement exists in this case. Each owner gave permission to the tenant, by separate lease, to use the property during the term of the lease. At the expiration of the lease each owner received back his property and was free to make such lawful use thereof as he deemed proper. Neither owner obtained rights thereby, in or over the premises of the other, that survived the termination of the leases, either in law or equity.

The judgment should, therefore, be reversed, with costs, the findings inconsistent herewith reversed, and judgment granted for the defendant, with costs.

CLARKE, P. J., SMITH and SHEARN, JJ., concurred; SCOTT, J., dissented.

SCOTT, J. (dissenting):

The defendant appeals from a judgment in equity which, in effect, decrees that two adjoining properties owned by different owners shall continue to be maintained and used, as they have been for many years, as a single building.

The facts are peculiar and so far as we are aware are not exactly paralleled by any reported case. Taken together the properties constitute a plot on the northwest corner of Fifteenth street and Irving place in the city of New York,

sixty-two feet six inches in width on Irving place and eighty feet in depth. The corner lot, which is twenty-two feet in width on Irving place, and was formerly known by the street number as No. 15 Irving place, is owned by plaintiffs as trustees. The remainder of the property, which is forty feet and six inches in width on Irving place, and was formerly known by the street numbers as Nos. 17 and 19 Irving place, belongs to the defendant as trustee.

Prior to the year 1870 there stood upon the property three private dwelling houses, each of which was complete in itself and had a separate entrance on Irving place. No. 15, on the corner, was then owned by Edward J. Lynch; No. 17 by Samuel Frost, and No. 19 by Mattie G. Brown. The latter property was purchased in 1882 by Samuel Frost, who thereafter, and until the time of his death, owned both Nos. 17 and 19.

In the year 1870 Edward J. Lynch leased his house and lot to Joseph Wehrle for the term of ten years, with the privilege of ten years' renewal. In the same year Samuel Frost leased No. 17 to the same Joseph Wehrle for the term of ten years, with privilege of renewal, the lease containing a stipulation that the property should be used for no "business or purpose which shall be more injurious to the said premises than the general hotel business." In the year 1872 Mattie G. Brown leased No. 19 to the same Joseph Wehrle for the term of eight years, with the privilege of renewal for ten years. This lease contained a stipulation identical with that in the above-mentioned lease from Samuel Frost as to the use of the property for no business or purpose more injurious than the hotel business.

Joseph Wehrle, having thus become the tenant for a term of years of all three properties, proceeded to make extensive and radical alterations therein with the purpose and effect of combining them into a single building which he used during the continuance of his term as an hotel under the name of the Hotel Belvidere. These alterations may be briefly summarized as follows: A mansard roof was constructed over all of the buildings. A basement and four-story addition with mansard roof was built over the rear of No. 15 (the corner lot), so that the hotel building covered and now covers the entire lot. This extension served as a kitchen in the

basement, and a dining-room on the main floor, the upper floors being subdivided by lath and plaster partitions. The middle house (No. 17) was used for the main entrance to the hotel. The front door and hallway were done away with and the front steps removed. The hotel entrance was so constructed as to extend across the whole front of No. 17, such entrance consisting of a door with side windows on which the names successively used for the hotel were painted.

The interior was arranged for the use of the whole property as one hotel. The main floor of No. 17 served for the entrance hall, and in that building were and are located the heating plant for the whole property; the elevator giving access (through openings cut in the walls) to all parts of the hotel; the ranges, boilers and kitchen flue as well as the electric meter. The drainage system for the whole property passes under No. 15 to Fifteenth street, and in the cellar of that portion of the property is a water meter which supplies the pump and hot water tank in No. 19 which controls the water supply to all parts of the whole building.

This was the condition of the property when Joseph Wehrle's lease expired. He did not exercise the privilege to renew. From the date of the expiration of his leases down to now the property has been in appearance and in fact a single building used for an hotel; the several owners, although apparently entering into no formal agreement between themselves as to leasing to the same person, always contrived so to lease their properties that they always had the same tenant, and this tenant has always used the property as a single, entire building under the name Hotel America, or Hotel du Nord.

It was abundantly shown by the evidence that if the property continued to be used in the future as in the past, as a single building, for hotel or some other purpose, it would have a reasonably adequate rental value, but if broken up into separate and disconnected properties, the buildings, and especially that portion consisting of what was formerly No. 15, belonging to plaintiffs, would be wholly valueless for any usable purpose, since it would be economically impossible to restore it to its former condition as a dwelling house with any hope of realizing an adequate and reasonable return upon the cost.

The defendant now contemplates selling so much of the property as was formerly known as Nos. 17 and 19 Irving place, and to that end proposes to erect a dividing wall between the corner lot (No. 15) and said No. 17 so as to cut off and wall up all the openings in the present walls between said parts of said hotel building, and to cut off and separate said corner building (No. 15) from the use of the main entrance and hallway, and the enjoyment of heat, gas, electric light and water furnished by the apparatus and appliances situated in Nos. 17 and 19, as the same have for many years been used and enjoyed by the common tenant of the whole property for the benefit of the corner lot. In short, it is the defendant's purpose to absolutely segregate that portion of the property owned by him from that portion owned by the plaintiffs, in such a manner as to render impossible the continued use of the whole property as a single building. The judgment appealed from enjoins this segregation. It may be said at the outset that neither landlord acquired any prescriptive rights against the others in consequence of the acts of Wehrle, who was the common tenant, holding under separate leases, for a tenant cannot take by adverse holding or by prescription against his landlord (*Jones v. Reilly*, 174 N. Y. 97, 107), nor can he transmit any such right to another.

The rights of the respective owners, as against each other, arose, if at all, when the property came back into their hands upon the expiration of Wehrle's leases in 1881, in the condition in which he had put it, and are to be established, if at all, by their dealings with the property during the period, exceeding thirty years, which has since elapsed. Of course the fact that the buildings had been transformed in use and appearance into one was obvious and patent as was the fact that the character of the property had been radically altered so that it was then no longer adapted to use as a block of single dwelling houses, and was adapted only for some use as a single building. But the acquiescence of the several owners to the use of the reconstructed building as a unit for the purposes of an hotel need not be deduced only from their knowledge of the use to which it was in fact put, but is expressly shown by many leases and consents to assignments

of leases, executed by one owner after another in which the use of the several properties as parts of the hotel is expressly recognized and stipulated for.

It may fairly be said from the evidence and findings that the owners of what were originally three houses finding their properties transformed into a single house under one roof and so arranged internally that every part of that house was dependent upon every other part, accepted and acquiesced in this reconstruction and interdependence for thirty-five years or more, all that time reaping an advantage from the existing arrangement. The question we have to consider is whether one owner, after having for so long a period recognized and profited by the mutual advantages flowing from the use of the property as a single building, may at will destroy the existing arrangement and segregate the properties to the detriment of the other owner. That either owner could have insisted upon physically segregating the properties when Wehrle's leases expired, or within twenty years thereafter, I do not doubt, but I am disposed to think that the recognized and accepted condition and use of the property had after twenty years established certain mutual rights as between the owners of the several parcels which neither is at liberty to disregard to the detriment of the other. From the history of the property as above detailed we should presume a grant or agreement between the owners that, so long as the building stood, it should continue to be used as a single building, each part enjoying the benefit to be derived from the mutual arrangement of all the parts.

It would serve no useful purpose to discuss at length the manner in which one owner may acquire by prescription, or presumed grant, the right to use his neighbor's land for the benefit of his own tenement. That such right may be acquired by long-continued user by the owner of the dominant tenement, coupled with knowledge and acquiescence by the owner of the servient, is settled. The books are full of cases in which this principle has been applied. Sometimes the right is exclusively for the benefit of the dominant tenement, and the burden borne solely by the servient. Such are the common cases of rights of way and rights of drainage. Sometimes the rights are mutual and reciprocal, each tenement being burdened



for the benefit of the other, and each being benefited at the expense of the other. Such in general are cases of party walls. . Nor are cases unknown to the law in which separate owners hold different parts of the same house, as for instance different stories. In such cases it has long been recognized law that neither owner may do anything within his own part or story which shall impair the safety or enjoyment of their parts or stories by the other owners. (*Humphries v. Brogden*, 12 Q. B. 739; and see Washb. Ease. & Serv. 480, 481.) According to this rule if the parties to the present action had owned different floors or stories of the whole building, instead of owning different parts thereof as they do, it would seem that neither could deal with his own part as to cut off that part owned by the other party and thus render it unusable and valueless. An interesting application of this rule arose in New Hampshire in 1809. D. and M. each owned one-half of a dwelling house. It had been built altogether; two rooms on a floor, chimney in the middle, entry on the front side, from which led stairs to both chambers and entrances into both rooms. The division was by an imaginary line running through the middle of the front door, entry, stairs, chimney, etc. The house was old and needed repairing. M.'s part was not worth repairing, but D.'s part was tenantable. The fire-wards upon view of M.'s part were of opinion that it was dangerous for want of repairs and ordered it to be repaired or otherwise rendered not dangerous on account of fire. M. elected to take down his part to the line. He left the materials of the entry for D.; he sawed through the plate girds, stairs, etc., but did not take down the chimney. All those things he did carefully, doing as little damage as possible to D.'s part of the house. D. sued for damages for trespass. It was held that he could recover. SMITH, Ch. J. (with whom all the other judges concurred), said: "I am inclined to think that each of the parties were interested in the entry, stairs, chimney, etc., and that neither could destroy these without the consent of the other; that each of these owners was under an obligation to the other to keep his part in repair, at least so far that the tenement of the other should suffer no injury from want of such repair. It may be likened to the case of a party wall which neither owner can remove. . \* \* \*

"From the nature of the thing, these parties must be considered as interested, as it were, in common, in the entry, chimney, stairs, etc.; and neither could destroy that in which the other had a valuable interest.

"Doe had an easement, or right of enjoyment, of that part of the entry which was beyond the middle line, which does not depend on the courtesy of the defendant; it is a matter of right. It is for the interest of both parties that this should be the case. It may be said the owner may do what he will with his own \* \* \*. But the truth is, it is not his own in an absolute, exclusive sense, because Doe has a right to the enjoyment of it." (*Doe v. Morrell*, Smith [N. H.], 255.)

In *Thompson v. Miner* (30 Iowa, 386) is presented a case similar in some aspects to the present in that a building was erected to cover three lots in such manner that it could be most adequately used together as a single building. The lots upon which the building stood passed into several ownership, but it was held that one owner could not cut off from that portion of the building belonging to the other owners the access provided by the stairs and passageways which were constructed on his part of the building. To the same effect is *Kane v. Templin* (158 Iowa, 24) where halves of a single building had been granted to different devisees. It was held that an easement existed for the use of the halls and stairways which stood in one half, for the benefit of the other half.

In many other cases the principle applied in the foregoing has been recognized and applied. (*John Hancock Mutual Life Ins. Co. v. Patterson*, 103 Ind. 582; *Foote v. Yarlott*, 238 Ill. 54; *Lead City Miners' Union v. Moyer*, 235 Fed. Rep. 376.) It is true that the facts in the cases cited are not identical with the facts in the case at bar and that in most of them the easements were created while the properties benefited and burdened were held in the same ownership where the use, which ripened into an easement, had its origin. But this does not affect the principle applicable to the facts we now have to consider. The only difference between easements arising upon the severance of an estate theretofore held in unity of ownership, and easements affecting properties held separately and never united in ownership, is as to the manner in which the ease-

ment is created. In theory all easements rest on grant, sometimes, although rarely, actually embodied in a deed, but much more frequently implied or presumed. (Washb. Eas. & Serv.\*32; *Nichols v. Luce*, 41 Mass. [24 Pick.] 102.) If an owner so builds upon or disposes of his property that one part is openly and continuously burdened with a use in favor of another part, and then severs the property and sells that part in favor of which the use has been established, retaining that upon which the burden rests, a conveyance of the right to continue the use will impliedly be found in the conveyance of the part granted, and the grantor will be estopped to deny that he intended to include in his conveyance the right to continue to enjoy the use. So when the owner of one parcel acquiesces, for twenty years or more, in the open, notorious and continuous use of his property for the benefit of the property of his neighbor it will be conclusively presumed that at some time a grant of the right had been made, and a like presumption will arise when two owners of adjoining parcels have for the requisite period of time enjoyed and exercised mutual and reciprocal beneficial uses over the property of each other.

While the law reports in this State are replete with cases dealing with the creation and enforcement of easements I have been able to find but one which resembles in its peculiar facts the one we are now considering. In that case it appeared that Bartholomew Karalus and his wife Katarzyna purchased a corner lot in the city of Buffalo which they owned jointly. Upon this lot they erected a building which they occupied as a saloon, grocery and dwelling house. Subsequently the husband individually acquired title to an adjacent lot. The two lots were inclosed with a fence and used and occupied as one tract, and the husband erected upon the lot acquired by himself individually an addition to the building erected on the corner lot. Connected with this addition were a shed, out-houses and a large woodshed. These buildings were all used together by the husband and wife, until the death of the former, twenty-five years after the properties had first been united in use. Later the wife died bequeathing her property to the plaintiffs. The husband having died intestate and without descendants, his heirs, after the wife's death, partitioned his

property. The defendants in the action bought the lot which the husband had acquired individually and had used in conjunction with the corner lot. The plaintiffs sought to impress an easement in this second parcel for its use in connection with the corner lot, which as it was claimed were inseparably connected, and all had been used together continuously and notoriously for nearly thirty years. The Appellate Division in the Fourth Department sustained the plaintiffs' contention, speaking through Mr. Justice SPRING, as follows: "I think the long occupancy in connection with the first lot, openly, notoriously and continuously, ripened by adverse user into a definite easement, and that the presumption of a grant is conclusive therefrom. (*Colburn v. Marsh*, 68 Hun, 269; *affd.*, on opinion below, 144 N. Y. 657; *Hey v. Collman*, 78 App. Div. 584; *affd.*, 180 N. Y. 560; *Fritz v. Tompkins*, 168 id. 524.)

"The rule is stated in this language in *Winne v. Winne* (95 App. Div. 48; *affd.*, 184 N. Y. 584) at page 50: 'Where the owner of the land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon the severance of the ownership the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance.' \* \* \*

"If the situation were presented between the husband and the wife, he would at this late day be estopped to repudiate his affirmative acts in affixing these buildings to the store and dwelling. \* \* \*

"The part of the building, for the various additions are so attached as to constitute one building, cannot now be severed without materially diminishing the value of the first tract purchased. \* \* \* The substantial character of the part added, its necessity for the beneficial use of the first property purchased and the manner in which it was joined to the first building denote that these two people intended that the entire building should remain as erected as an appurtenant to the first lot." (*Fronckowiak v. Platek*, 152 App. Div. 301.)

It may be noted in regard to the case last quoted that although there had been a partial unity of ownership, the court preferred to rest its decision upon the long-continued and notorious use.

Applying the foregoing rules and illustration of the application in previous cases to the case at bar, I am of opinion that the plaintiffs are entitled to the protection which they seek and which has been awarded to them by the judgment appealed from. The separate owners not only adapted their buildings to a common use, or, what amounts to the same thing, adopted and acquiesced in the adaptation thereof made by their common tenant, but for more than thirty years have continued its use as a single building and have, more than once, stipulated expressly that their separate properties shall be used as part of an hotel which occupied the entire property. Out of this long acquiescence has grown, as I consider, a conclusive presumption that the use of the building as a whole, and the interdependence of each part upon every other part had origin in mutual and reciprocal grants between the owners. Neither owner can now, as I apprehend, lawfully destroy the mutual and reciprocal easements established by long acquiescence, to the detriment and damage of his neighbor's property. If it be said that the continuance of this state of affairs threatens to make the management of the property difficult, the answer is that the owners for some forty years have managed to use the property profitably in the precise condition in which the judgment appealed from would leave it.

The appellant calls our attention to an apparent contradiction between the 33d finding of fact to the effect that there was an agreement between the owners that the building in question should be used as an hotel, and the 37th finding to the effect that the respective owners had at no time entered into any agreement with respect to the joint or combined use of the properties. The contradiction is more apparent than real. In the 33d finding the court evidently referred to the presumed agreement resulting from long-continued use and acquiescence. In the 37th finding the court evidently meant to find that no formal agreement had been entered into between the owners. It should be amended to as to express that meaning clearly.

The judgment should be affirmed, with costs.

Judgment reversed, with costs, and judgment ordered for defendant, with costs. Order to be settled on notice.

HENRY L. HIGGINSON and Others, Copartners in Trade Doing Business under the Firm Name and Style of LEE, HIGGINSON & COMPANY, Respondents, v. THE CITY OF NEW YORK, Appellant.

Second Department, January 18, 1918.

**Municipal corporations — negligence — liability of city for damage to goods from escape of water from high pressure hydrants — results of omission to produce evidence as to cause of injury.**

While a municipality is not liable for escape of water from its mains or hydrants without evidence of negligence, a city having the duty of inspection and user over the apparatus causing damage, is subject to the results of omitting to produce evidence showing how the injury arose or what was the difficulty on the occasion of such damage.

In an action against the city of New York for damage to goods in a warehouse caused by water, it appeared that a high pressure hydrant burst between nine and ten A. M., and that the water was not shut off until some time between eleven and twelve. The broken hydrant, the chief evidence of the cause of the injury, was not produced as it had been disposed of for junk, and the city made no explanation. Evidence examined, and *held*, that a judgment in favor of the plaintiffs should be affirmed.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 10th day of January, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Sometime between nine A. M. and ten A. M. on July 8, 1912, the hydrant of the high pressure water service on the west side of Furman street, about 190 feet north of Joralemon street, burst, so as to flood two vacant lots somewhat lower than the sidewalk, and create a pool that was rising against the easterly side of two warehouses, Nos. 63 and 64 of the New York Dock Company. After the dock company employees tried vainly to divert the water by a trench, they erected a dam on the top of the sills of the low windows of the warehouse by bags of cement. Meantime, inside the warehouses, they were moving the merchandise further from

the windows, so as to be beyond reach of the flooding. But the water rose a foot above the level of the lower window sills, and penetrated within the warehouses, damaging plaintiffs' wool. Sometime between eleven and twelve the city officials shut off the water, although appellant claims this was done sooner. Plaintiffs' damage was \$958.75, for which they had a verdict.

*Edward A. Freshman* [*Lamar Hardy, Corporation Counsel*, and *Thomas F. Magner* with him on the brief], for the appellant.

*Edward J. Mastaglio* [*John K. Berry* with him on the brief], for the respondents.

PER CURIAM:

The verdict for the plaintiffs followed a charge which was quite as favorable to the city as the facts justified. The escape of water from this hydrant was at such pressure and volume that it covered an area of 14,000 square feet to a considerable depth, so that it came above the lower sills of the warehouse windows. The hydrant was found broken far below the ground, where it was not subject to surface shocks. There was no evidence as to the nature of this break, whether an old fracture, or of recent appearance. The broken hydrant—itsself the chief evidence of the true cause of the injury—was taken to the city storage yard, and afterwards broken up and disposed of for junk.

Such a hydrant can be readily tested by pumping into it under pressure.

While a municipality is not liable for escape of water from its mains or hydrants without evidence of negligence (*Jenney v. City of Brooklyn*, 120 N. Y. 164), a city, like any other defendant, having the duty of inspection and user over the apparatus causing damage, is subject to the effect of omitting to produce evidence, showing how the injury arose, or what was the difficulty on the occasion of such damage. (*Gravey v. City of New York*, 117 App. Div. 773.) Here the city made no explanation, although it does not show that such an explanation could not be made. This left it for the jury to say, on the expert testimony, whether defendant had absolved itself from negligence.

The issues as to reasonable promptness in shutting off the water, in view of its dangerous and threatening flood, were properly left to the jury, and their finding against the city was a fair conclusion from all the evidence.

The judgment and order should, therefore, be affirmed, with costs.

Present — JENKS, P. J., THOMAS, MILLS, RICH and PUTNAM, JJ.

Judgment and order unanimously affirmed, with costs.

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FREDERICK W. HUBER, Respondent, v. ANNA GORG and CHARLES K. HOERNING, Appellants.

Second Department, January 25, 1918.

**Highways — alteration — acceptance — dedication — abandonment of portion of highway — ownership of title — vendor and purchaser — deed — breach of condition subsequent — re-entry.**

Where a town for the purpose of straightening a highway shifted it to one side at the instance and expense of the owner of the abutting land, the owner will be deemed to have dedicated and the town to have accepted the additional land, although there was no conveyance.

Upon the abandonment of the portion of the road, title thereto did not revert to the grantor to the town, who had conveyed "for the purpose of said road," nor did it pass to the abutting owners, but as it was not conveyed by the town the title remained in it and has passed to its successor, the city of New York, which in justice should grant releases to the owners of the several lots abutting thereon.

A buyer of one of said lots should not be obliged to accept the conveyance without a release from the city.

If the grant were on condition subsequent, the title of the city, the successor of the town, could be defeated only by re-entry.

A right to re-enter for a breach of condition subsequent is not an estate.

APPEAL by the defendants, Anna Gorg and another, from a judgment of the County Court of Queens county in favor of the plaintiff, entered in the office of the clerk of said county on the 10th day of January, 1917, upon the decision of the court, a jury having been waived.



*Louis J. Halbert*, for the appellants.

*George A. Nagle*, for the respondent.

THOMAS, J.:

A parcel of land abuts the west side of Flushing avenue for the distance of two hundred and ten feet from Prospect avenue. The defendant Gorg agreed to convey it to the assignor of the plaintiff, who questions the title to a strip varying from some fourteen to sixteen feet wide and forming the frontage of the lots. The street, formerly known as Bushville road or Flushing avenue, runs northerly from the Jamaica and Hempstead turnpike, and for the purpose of straightening it was shifted in 1893 so that its westerly line was carried so far easterly as to leave unused for road purposes the strip described. The disused strip apparently became a part of the land that was bounded by the old road, and has become the frontage on the westerly side of the corrected and present avenue. Before it was separated from the street, the town of Jamaica had the title to it, and there is no evidence that it parted with the title. The land on both sides of the old road was owned by the German-American Real Estate Company, at whose instance and expense the alteration in the lines of the road was made. Although it did not convey the land on the easterly side of the old road taken into the new road, its action was a dedication, and the acceptance by the town is manifest. But the proceedings do not indicate that an exchange of land was made, although that such was the intention is inferable. As the town of Jamaica did not convey the abandoned strip, the title remained in the town and has come to its successor, the city of New York, which in justice should release to the owners of the several lots abutting on the westerly side of the present avenue. But in the present state of the title the buyer should not be obliged to accept the conveyance. It is urged that upon the abandonment of the road over the strip the title to it reverted to Bailey, who conveyed, "for the purpose of said road," to the town of Jamaica in 1857, or that it inures to his successor in title, if any there be. The road was laid out in 1853, and a substantial sum was awarded to Bailey. Against that contention is invoked the decision in *Brooklyn Park Comrs. v. Armstrong*

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(45 N. Y. 234). The title came to the town, and under the decision it remains in the town's successor. The strip did not pass to the abutting owners upon abandonment, and the doctrine of adverse possession is not suggested. (*Pooler v. Sammet*, 130 App. Div. 650, 652.) If the grant were on condition subsequent, the city's title could be defeated only by re-entry. But a right to re-enter is not an estate. (*Vail v. Long Island R. R. Co.*, 106 N. Y. 283.)

The judgment of the County Court of Queens county should be affirmed, with costs.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment of the County Court of Queens county affirmed, with costs.

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DONALD McKELLAR, Respondent, v. AMERICAN SYNTHETIC DYES, INCORPORATED, Appellant.

Second Department, January 25, 1918.

**Principal and agent — contract of special employment construed — appeal — errors available in absence of exceptions.**

A letter, by which the defendant states that "we understand from you that you are in touch with the representative of a prospective purchaser of picric acid" and "we are writing this letter to assure you that if the business which you are introducing to us on this occasion results in the making and carrying out of a contract for the supplying of picric acid to this prospective purchaser, we will set aside to pay over to you a commission," constitutes a contract of special employment, and the services of the person to whom the letter was written "in touch with the representative of a prospective purchaser" are of the essence of the contract, and the defendants cannot be held liable thereunder for commissions on a contract of sale procured through another broker introduced, by the one to whom the letter was written, to persons not in the contemplation of the parties at the time of the writing of the letter.

Errors in the interpretation of or instructions in relation to said contract by the court are available on appeal, even in the absence of exceptions.

APPEAL by the defendant, American Synthetic Dyes, Incorporated, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county

of Nassau on the 11th day of June, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of June, 1917, denying defendant's motion for a new trial made upon the minutes.

The action is brought by the assignee of Knapp and Kelley to recover broker's commissions upon a sale of 3,100 tons of picric acid to the Russian government for \$6,200,000. The sale was made in the fall of 1915. The plaintiff declared upon a contract made in a letter written by the defendant and delivered by it to Knapp on June 22, 1915. The plaintiff recovered a verdict at Trial Term of \$261,000, and the defendant appeals. The contract was as follows:

"NEW YORK CITY, *June 22nd, 1915.*

"MR. CLYDE D. KNAPP and MR. C. CARLETON KELLEY,

"New York City:

"GENTLEMEN.—As the result of a conference this afternoon we understand from you that you are in touch with the representative of a prospective purchaser of picric acid in large quantity and covering deliveries for substantially eighteen months. You desire to be protected in the matter of a commission for bringing about a sale, if any shall be made on the part of the American Synthetic Dyes Incorporated to the prospective purchaser in question, and, therefore, we are writing this letter to assure you that if the business which you are introducing to us on this occasion results in the making and carrying out of a contract for the supplying of picric acid to this prospective purchaser, we will set aside to pay over to you as a commission 4.1% of the gross sales price received under such a contract. It is understood that there is no obligation resting on the American Synthetic Dyes Incorporated to make any contract which it may not consider in its interest to make."

The learned court read the letter to the jury, and then said: "That contract as I read it and as I interpret it to you means nothing more than this: That this man Kelley and this man Knapp were brokers, and that under the contract that they might introduce to these people, as prescribed by the words of the contract itself, a purchaser for the sale of that picric acid. If the brokers named above, the plaintiff's assignors in this case, were in any manner whatsoever

instrumental in bringing about or introducing or negotiating a sale of picric acid to a prospective purchaser, the defendant in this case would be liable for the commission, and the commission is fixed by the terms of the contract, and that is the contract as I interpret it, and, therefore, as I view this litigation there are two questions only which you need consider in this case: The first is, did the plaintiff's assignors, Kelley and Knapp, ever bring to the attention of the defendant company, or introduce to the defendant company or bring about in any manner, directly or indirectly, a customer to whom they sold picric acid as covered and intended by that contract and agreement. Did they do that? The defendant says they did not. That is one question. And the next question you will consider in this case is whether this contract was ever abrogated. The defendant says it was. The plaintiff says it was not."

Arthur J. Shores, for the appellant.

Henry A. Uterhart [Stephen C. Baldwin with him on the brief], for the respondent.

JENKS, P. J.:

The action was tried and submitted upon the express contract, and there was no question of recovery on *quantum meruit*. The undisputed proof shows that about a month after the making of the contract for commissions, Knapp introduced to the defendant, Hollingsworth, a broker, and that thereupon Hollingsworth, as broker for the defendant, negotiated the contract for the sale. Upon these facts, the court's interpretation of the contract, and its instructions to the jury as to proof that would cast liability upon defendant, made the verdict for the plaintiff almost inevitable. Referring to such instructions, none could say that an introduction of a successful broker to the defendant was *not* "in any manner whatsoever instrumental in bringing about or introducing or negotiating a sale \* \* \* to a prospective purchaser," or that by such introduction the introducer did *not* "bring to the attention of the defendant company, or introduce to the defendant company or bring about in any manner, directly or indirectly, a customer," or that the introducer did *not* do

"anything under it [the contract of employment] which the letter and spirit of this contract calls for," or that such introduction had *not* "inured to the benefit of this defendant company through his instrumentality, no matter how slight." It is true that the court confined the jury to the contract, by such phrases as "If his assignors did anything under it which the letter and spirit of this contract calls for," and "a customer to whom they sold picric acid as covered and intended by that contract and agreement," but the court thereby referred to the contract as interpreted by the court itself.

It seems to me that the correctness of the court's interpretation of the contract presents the crucial question of this appeal.

I think that the contract was one of special employment, not one of general employment of a broker to find a purchaser or a certain prospective purchaser. Not the services of Knapp, but the services of Knapp "in touch with the representative of a prospective purchaser," were "of the essence of the contract," to use the phrase of ALLEN, J., in *Spalding v. Rosa* (71 N. Y. 43). Knapp as a broker, and Knapp in touch with the representative of a prospective purchaser, were two different entities. "It was inherent in the bargain that a substituted service would not answer." (*People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 180.) The compensation or commission named contemplated a sale that resulted from the business which Knapp was then "introducing" — not Knapp unqualified, but Knapp in touch with the representative of a prospective purchaser. "In touch" means in "close relation of mutual confidence, sympathy, interest, or the like; sympathy; accord or harmony in relation to common interests." (Century Dictionary.) It implied even more than knowledge of the representative and of his identity, and more than a general acquaintance with him. Naturally, the prospective value of a broker "in touch" with the representative of a prospective purchaser would be greater to a vendor than the value of a broker who might find a purchaser, or even the particular purchaser in prospect. There is, perhaps, an illustration of this difference in this very case. For we find that the defendant agreed to pay a commission of 4.1 per cent. to Knapp and paid but 1½ per cent. to Hollingsworth. The error of

the court was that it interpreted this contract as performed if Knapp as a broker was "in any manner whatsoever instrumental in bringing about or introducing or negotiating a sale of picric acid to a prospective purchaser."

The defendant contended that Knapp had not performed the contract of June 22. It appeared that upon delivery of the letter of that date that constituted the contract, Knapp took the representative of the defendant to visit Herbert, an associate of Kuhn, Loeb & Co., who he thought had some relation with the Russian government in that Herbert had inquired the freight rates of picric acid to San Francisco, and thereupon negotiations were begun through Herbert. But those negotiations came to nothing, and thereafter Herbert notified the defendant of his failure, and abandoned any further effort. Then it was that, at the end of July, Knapp introduced Hollingsworth to the defendant. Knapp did not know Hollingsworth at the time of the delivery of the letter of June 22. Hollingsworth testified that he never represented the Russian government. His sole relation with that government, as testified to by him, was that he had known personally the head of the Russian Commission since May, 1915. Consonant both with his bill of particulars and with the avowal at trial of his learned and able counsel, "It is Mr. Hollingsworth who conducted it, and we claim under that contract, which is in evidence," the plaintiff upon cross-examination undertook, not at first but finally, to identify Hollingsworth as the representative of the prospective purchaser referred to in the contract of June 22. Knapp was asked: "Q. And who was the representative of the Russian Government that you then had in mind? A. Mr. Hollingsworth — not Mr. Hollingsworth, excuse me. I was then in touch with a representative through Mr. Kelley. Q. Through Mr. Kelley? A. Mr. Hopkins and Mr. Herbert. \* \* \* Q. What persons were you in touch with and what persons did you have in mind other than Mr. Hopkins and Mr. Herbert and your own associate, Mr. Kelley, when you represented to the American Synthetic Dyes, Incorporated, that you were in touch with a prospective purchaser? A. I had Mr. Lutkins, of the General Chemical Company." To adopt the narrative form, the witness continued: I was in touch with Mr. Lutkins

through Mr. Kelley, and Mr. Lutkins through Mr. Kelley advised me — had assured me that Mr. Hollingsworth was the real avenue to the Russian government, that is, to the purchasing department on picric acid in the Russian government. This had been told me before my talk with Mr. Washburn (the president of the defendant) and before I had received the letter of June 22. I did not at that time meet Mr. Hollingsworth, but I was in touch with him through Mr. Kelley. Mr. Kelley knew Mr. Lutkins very well. Mr. Lutkins did not know Mr. Hollingsworth, but he did know Mr. Munson, Mr. Hollingsworth's secretary, very well, as did Mr. Kelley. I do not know whether or not, at the time when I made the representation to Mr. Washburn and had received the letter of June 22, I or Mr. Kelley had opened up with Mr. Hollingsworth or Mr. Munson the subject of a sale of picric acid to the Russian government. I was first introduced to Mr. Hollingsworth on June 29. At the time I had received this letter, I had not discussed with Mr. Munson or Mr. Hollingsworth, or Mr. Hopkins even, any possibility of a sale of picric acid to the Russian government.

The jury could have inferred from Knapp's testimony that he had several persons *in mind*, *e. g.*, Hopkins, Herbert, Hollingsworth, at the time of the letter of June 22. Because Knapp was not contradicted, the jury were not bound to believe that Hollingsworth was then in Knapp's mind. For one cannot contradict another's thought, unspoken. With immunity from contradiction, Knapp could have testified that any individual then known to him was in his mind when he made the agreement. As we have seen, Knapp does not pretend that he had "the," but several (supposed) representatives in mind. But there was evidence contrary to such contention as to Hollingsworth. At first Hollingsworth was not named, and nothing was done to identify him. But Knapp did forthwith indicate Herbert, in that he took the representative of the defendant to Herbert in Kuhn, Loeb & Co.'s office, and thereupon negotiations were begun for a sale to the Russian government which were abandoned only after efforts of some weeks' duration. And there is evidence that immediately after the letter of June 22d was delivered, Knapp had announced that the prospective purchaser was Kuhn, Loeb

& Co. Only thereafter was Hollingsworth brought into relation with the defendant. Even if Knapp had Hollingsworth in mind with others, there is considerable proof to indicate that Hollingsworth was not then, nor at any time, a representative of the Russian government, and also that Knapp was not in touch with Hollingsworth, even if he had him in mind. I do not undertake to summarize all of the proof upon this question, for I have no purpose to consider the weight of it. My purpose is rather to indicate that there was a serious question presented whether the plaintiff had performed the contract as I interpret it.

The vice of the verdict is that the plaintiff, declaring upon the express contract, was enabled to recover thereunder by an interpretation of that contract that relieved him from proof of a performance required by the terms of the contract.

There were no exceptions taken to the interpretation or the instructions, but it is well settled that, even in the absence of exceptions errors of such a character are available in this court.

I do not express any opinion upon the proof offered upon the issue described by the learned court as "abrogation." The question whether the dealings of Knapp and the defendant subsequent to the failure with Hopkins and preliminary to the defendant's employment of Hollingsworth, constituted a modification of the contract of June 22, in that the introduction services of Knapp entitled him to the commission named in that contract, was not directly presented to the jury.

I advise that the order and judgment be reversed and that a new trial be granted, costs to abide the event.

THOMAS, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.



MEIER STEINBRINK, Appellant, v. W. BERNARD VAUSE and  
Others, Respondents.

Second Department, January 25, 1918.

**Corporations — dissolution — agreement by stockholder to pay certain sum from his distributive share upon dissolution of corporation — suit to foreclose deed, executed under such contract, as a mortgage.**

In a suit to foreclose a deed as a mortgage, it appeared that the conveyance was made to assure the obligation of one C. under a tripartite contract executed between him, three other stockholders and the plaintiff; that the maximum amount of money receivable thereunder was \$6,500, which was to accrue from a fund arising from C.'s distributive share upon the dissolution of the corporation in which he had a controlling holding; that the assets out of which the fund should arise were not limited to personal property, but included the corporation's real estate; that C. being also a creditor of the company, stipulated in the agreement that he would "not assert or enforce any claim \* \* \* until after the payment of the \$6,500;" that on the same day C. and one Y. made another agreement which recited that C. had assigned to Y. claims against the corporation and had obligated himself to pay the \$6,500, and thereupon C. and Y. agreed that the assigned claim should be enforced only against the real property of the corporation "and that even in the latter event the proceeds of the enforcement of such sale, whether in cash or represented by real estate or other property" shall be held by V. and the plaintiff "until such time as the \$6,500 above mentioned shall have been paid in accordance with the terms of the agreement referred to;" that upon the dissolution of the corporation C.'s distributive share from the sale of the personal property being insufficient to pay the \$6,500, the real estate instead of being sold was conveyed by the corporation to one S. in payment of a debt which the corporation at one time owed C., but which had been assigned by him to Y., and also to indemnify the corporation against other liabilities, and was by S. conveyed to plaintiff and V.

*Held*, that under the agreements the payment of the \$6,500 was to be preferred and paid from the sale of all the assets on dissolution, and that if the real estate should be otherwise applied to C.'s claim, the plaintiff and V. should hold the resultant property until the \$6,500 should be paid; that, therefore, unless the balance of said amount be paid with interest and costs, the real estate should be sold to satisfy said balance and the remainder paid to plaintiff's grantor or his assigns.

APPEAL by the plaintiff, Meier Steinbrink, from a judgment of the Supreme Court in favor of the defendants, entered in

App. Div.]

Second Department, January, 1918.

the office of the clerk of the county of Kings on the 22d day of January, 1917, dismissing the complaint on the merits upon the decision of the court after a trial at the Kings County Special Term.

*Robert H. Wilson* [*Meier Steinbrink* with him on the brief],  
for the appellant.

*Walter E. Warner*, for the respondent *Yeomans*.

THOMAS, J.:

The plaintiff and the defendant Vause are the grantees in an unrecorded deed dated and acknowledged February 29, 1916, and executed by Walter R. Shepperd. Neither grantee asserts absolute title, and the plaintiff declares that it is a mortgage to secure to plaintiff and others the payment of a balance of money. The defendant Vause does not affirm or deny. The only question is whether there is something due, for all contending parties assert that the conveyance was made to assure the obligation of Herbert Cooper under a tripartite contract dated December 9, 1915, executed between him, three persons named Kirkham, and plaintiff. The maximum amount of money receivable under the contract was \$6,500, but it was to accrue from a fund arising from Cooper's distributive share to stockholders upon the dissolution of the Cooper Diamond Company, in which he had a controlling holding, aside from the 451 shares bought of the Kirkhams under the agreement. Such distributive share from the sale of the company's personal property on dissolution of the corporation amounted to \$4,245.42, which was paid to plaintiff and the Kirkhams, and, as respondent contends, discharged Cooper's obligation. The assets out of which the fund should arise were not limited to personal property, but included the company's real estate of the value of \$36,000, subject to a mortgage under foreclosure for \$17,500, and also interest and taxes amounting to no more than \$2,500. There was, then, from such source, an additional sum of some \$20,000 in the distribution of which Cooper, owning 3,002 of 3,725 outstanding shares of stock, would be entitled to participate, and which thereupon would become applicable to the payment of any unpaid balance of the \$6,500. It appears,

however, that Cooper was a creditor of the company for a large sum, which, if enforced against the assets, would leave unpaid some part of the \$6,500, and Cooper stipulated in the agreement that he would "not assert or enforce any claim \* \* \* until after the payment of the \$6,500." But instead of selling such real estate, it was conveyed by the company to Shepperd and by him to plaintiff and Vause. Why that was done appears plainly. It was conveyed to Shepperd in payment of a debt which the company at one time owed Cooper, but assigned by him to Yeomans, and also a debt for a relatively small amount due from the company to Mrs. Yeomans, and to indemnify the company against some other liabilities. Cooper and Yeomans were privy to that arrangement, and, unless the rights under the agreement with plaintiff and the Kirkhams were conserved, it would have been a fraud to divert from distribution upon dissolution of the company such principal and valuable asset. But Cooper and Yeomans were entirely honorable in the acquisition of the real estate. It was proposed to insert in the agreement with plaintiff and the Kirkhams permission to Cooper to assert and to enforce his claim against the real estate of the company, but that, even in that event, the proceeds of the sale, "whether in cash or represented by real estate or other property, shall be held by W. Bernard Vause and Meier Steinbrink until such time as the \$6,500 herein provided for, has been paid." But such provision, withheld finally from that agreement, was incorporated concurrently in time and occasion in an agreement between Cooper and Yeomans of which the parties to the other agreement were cognizant. For, on the same 9th day of December, 1915, when plaintiff and the Kirkhams made their agreement with Cooper, the latter and Yeomans made another agreement, which recited that Cooper had assigned to Yeomans claims against the company, and that Cooper had "obligated himself to pay the sum of sixty-five hundred (\$6,500) dollars to the persons named in said agreement, from the proceeds of certain stock therein mentioned," and thereupon Cooper and Yeomans agreed that the assigned claim should be enforced only against the real property of the company, "and that even in the latter event, the proceeds of the enforcement of such sale, whether

in cash or represented by real estate, or other property, shall be held by W. Bernard Vause, Esq., and Meier Steinbrink, Esq., until such time as the \$6,500 above mentioned shall have been paid in accordance with the terms of the agreement referred to; immediately upon which payment being made, the proceeds of the sale of the real estate, or so much remaining thereof, shall immediately be transferred or paid over to the party of the first part or the lawful owner thereof." The two agreements were executed at the same date at the plaintiff's office, and were parts of the same transaction, and made for the purpose of effecting the same result, namely: the conservation of the assets of the company, personal and real, for the purpose of meeting the payment of \$6,500. The company authorized the conveyance on December 16, 1915, with Cooper present and presiding, the attorney for the company, presumably Vause, participating, and the plaintiff offering the resolution for the conveyance. On January 27, 1916, Yeomans accepted the proposition of the company and released accordingly, and directed the conveyance to be made to Shepherd; and it was done by deed of the same date. The record shows that Cooper is receiving, in whole or in part, the rents from the tenants of the land. The respondent's position is that the real estate could be withdrawn from the assets and plaintiff and the Kirkhams limited to the proceeds from the personalty, and that the conveyance of the real estate was merely to assure that. However, the agreement clearly shows that the \$6,500 payment was to be preferred, and met from the sale of all assets on dissolution, or, if the real estate were otherwise applied to Cooper's claim, that plaintiff and Vause should hold the resultant property until the \$6,500 should be paid, and that all concerned arranged for that, and made contracts and deeds in concert or in sequence for that end. Each and all of the parties were in accord, and commendable means were adopted to carry out the plan. It should not be defeated in a court of equity. The plaintiff and Vause are in possession of the title to what must be deemed a fund for the payment of the \$6,500, and it is necessary that the land should be sold for distribution to the parties entitled.

The judgment should be reversed, and judgment entered (1) that Vause and plaintiff forthwith cause the deed held

by them to be recorded; (2) that unless the balance of the \$6,500, with interest and costs of this action in this court and in the court below, be paid within thirty days after the service of notice of judgment on the respondent's attorney, the land be sold in accordance with the practice on foreclosure of mortgages, and that out of the proceeds of sale such payments should be made; (3) that upon the payment of the amount due plaintiff with interest and costs as directed, plaintiff and Vause convey the land to the grantor from whom they received it, or, in case it shall have been sold under the judgment herein, that there shall be paid to such person or his assigns any residue after making payment to the plaintiff as above directed. Findings of fact 7 to 14, and conclusions of law 1 to 4, all inclusive, are reversed, and findings will be made in accordance with this opinion.

MILLS, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment reversed, and judgment entered in accordance with opinion. Findings of fact numbered 7 to 14, and conclusions numbered 1 to 4, all inclusive, reversed, and findings to be made in accordance with said opinion. Order to be settled before Mr. Justice THOMAS.

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THE VILLAGE OF PEEKSKILL, Plaintiff, v. THE PUTNAM AND WESTCHESTER TRACTION COMPANY, Defendant.

Second Department, January 25, 1918.

**Street railroads — maintenance of highway — Railroad Law, section 178, not repealed by Highway Law, sections 137 and 142a — change of grade.**

Section 178 of the Railroad Law, providing for the maintenance by railroad companies of the highway between and outside of the tracks, has not been impliedly repealed by sections 137 and 142a of the Highway Law providing for the construction of State or county highways through villages, and the fact that a village did not at the time of the improvement of a portion of a highway by the Highway Department, deem it advisable to have the other portion of the highway over which a street railroad was being operated improved, does not prevent it from subsequently com-

selling said street railway company to repair the street in compliance with its franchise and section 178 of the Railroad Law.

A change of grade at the crown of a street to an unstated amount is not a change of grade within the contemplation of the statute.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*Robert F. Barrett, Corporation Counsel*, for the plaintiff.

*H. R. Barrett*, for the defendant.

THOMAS, J.:

The defendant company has a franchise to operate over its tracks in the village of Peekskill upon the stipulation that it shall maintain and keep in repair the portion of the street used therefor "between its tracks, the rails of its tracks and two feet outside of its tracks." The agreement incorporates the command of section 178 of the Railroad Law, which directs the same things to be done under the supervision of the local authorities "whenever required by them to do so, and in such manner as they may prescribe," and that in case of neglect such authorities may do them at the expense of the corporation.\* The defendant has refused to make the repairs; the plaintiff has caused them to be made, and the controversy now submitted is, whether section 178 has been repealed by implication by the Highway Law, of which section 137 authorizes the construction of a State or county highway through a village, unless the street has "been so improved or paved as to form a continuous and improved highway of sufficient permanence as not to warrant its reconstruction, in which case such highway shall be constructed or improved to the place where such paved or improved street begins." Section 137 then provides for an instance where "it is desired to construct or improve any portion of a State or county highway within such village \* \* \* at a width greater than that provided for in the plans," or to modify the plans with increased cost. The desire is to be expressed by the trustees of the village, and the Highway Commission must heed it; but the

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\* See Consol. Laws, chap. 49 (Laws of 1910, chap. 481), § 178, as amd. by Laws of 1912, chap. 368.—[REp.]

"cost of such additional construction" must be paid by the village. (Consol. Laws, chap. 25 [Laws of 1909, chap. 30], § 137, as amd. by Laws of 1910, chap. 233; Laws of 1911, chap. 88; Laws of 1912, chap. 88, and Laws of 1913, chaps. 131, 319.)\* The defendant's contention is that the Highway Law, amended so as to enable the continuance of State or county highways through or into villages, did not provide for an occupying railroad company sharing in the expense thereof, and that for that purpose the Highway Law was amended by the addition of section 142a, which did make such provision, but excepted the county of Westchester in this way: "This section shall not apply to such paving or improvements in villages in counties adjoining cities of the first class." (Laws of 1913, chap. 177.)† If defendant's entire contention be true, the defendant is relieved *in toto* from paving within and about its tracks, or from the cost thereof. The amendment of 1913 to the Highway Law (§ 142a) contemplates that when a State or county highway is constructed along a village street on which a street railroad is laid, the proposal and contract shall include the spaces for the maintenance of which railroad companies had been made responsible under the Railroad Law; but that the work shall be done "under the same supervision as the work of improvement of the remainder of such street," and that the cost of the improvement in such spaces shall be certified to the authorities, who shall assess it upon the property of the railroad company. But it is to be observed that what should be done in that regard under section 142a depends upon the exercise of the power given by section 137, whereby, as already stated, there was granted ability to continue the State or county highway, an enablement, however, not to be exercised if the existing village street is in such condition as to form a proper continuation of the State or county highway. It has been noticed that if the proposal to improve the village street does not meet the desires of the local authorities, amended proposals incurring increased cost must be adopted at the expense of the village. In the present case the village authorities accepted

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\* Since amd. by Laws of 1916, chap. 571.—[REp.]

† Since amd. by Laws of 1916, chap. 578.—[REp.]

on April 25, 1912, the original plans of the Highway Department, made pursuant to sections 137 to 142a of the Highway Law, and the work was done without expense to the village. The plans did not cover the spaces maintainable by the railroad company, nor did the village ask for such change of the plans as would include such spaces in the proposals, the contract, the work, or the supervision of the Highway Department, nor did such proposals, contract or work limit the construction or improvement of the State or county highway "to the place where such paved or improved street begins," if that means the outward terminal, nor did the State Highway Department condemn or disapprove of the part of the street occupied by the railroad company. What was done was this: The improvement was on the easterly side of the street with its westerly side two feet from the easterly rail. That left the railroad spaces and all westerly thereof undisturbed. So the street remained until April 16, 1915, when the plaintiff decided to pave such portion of the street as the State had not included in its undertaking and notified the defendant to do its part as required by the Railroad Law (§ 178), and to lay a new rail in conformity to the requirements of the paving and the new level, which was unchanged at the curb but somewhat lower at the crown of the road. The defendant furnished the new rails, but otherwise refused to do the work. All of this improvement could have been done in 1912 when the Highway Department made its improvement on the street easterly of the railroad, and the Highway Department would have been compelled to improve the street through its whole width had the village authorities demanded that it should be done at its own expense. But it must be assumed that the Highway Department and defendant did not at that time regard the additional work necessary, presumably because the unimproved portion had the apparent uniformity and permanence that did not require immediate reconstruction. The Highway Department was not required to improve any of the village street, if it deemed it unnecessary. What would then happen? Must the village leave it forever unimproved? I cannot think so. The plaintiff could not compel the Highway Department to do it in 1915.



That Department decided and acted in 1912, and even if its powers had not abated, the village could not set it in motion. The village was always subject to find its streets untouched by the Highway Department, or affected in part only by its action. Whenever the Highway Department did propose to improve a street and the defendant insisted that the width as planned should be greater, the increased cost rested on the village. But the plaintiff was not obliged to demand that there should be done in 1912 what was not necessary until 1915, and for that purpose require fuller improvement of the street, or indeed if the Department did not improve any part of the street that it should do so. The result is that the Highway Law did not involve an unlimited and unconditional new jurisdiction of village streets, or an universal new method of improving them inconsistent with the existing law, and hence the earlier statutes were not superseded. What was done was to authorize the Highway Department, in the course of the improvement of a highway, to carry the same upon and through a village street, if the same were required for the continuity of an appropriate highway, and when it exercised its power a village could at its own expense insist that the improvement be something more in quality and quantity, but was not required to do so, if proper administration of the highways did not require it or the finances did not permit it. Nor can I think that, if the Highway Department did not propose improvement that included the railroad, and the village did not ask for it at the time, the railroad should go free in case the village at some future and more fit time should propose to do what the Department had not done. It results from this discussion that the plaintiff should have judgment as demanded. It is also concluded that there was not change of the grade. The change of grade at the crown of the street to an unstated amount is not a change of grade in the sense contemplated by the statute.

Judgment for plaintiff, with costs.

JENKS, P. J., PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Judgment for plaintiff on agreed statement of facts, with costs.

FRANK TRANI, Respondent, v. SUMNER GERARD, Appellant.

Second Department, January 25, 1918.

**Trusts — individual liability of trustee in control of tenement house for negligence in making repairs.**

A person who, as trustee of a tenement house, causes the stairways to be improperly and negligently repaired and then lets that condition grow into a further defect whereby a tenant is injured, is not shielded from personal liability by reason of his trusteeship. Although his opportunity to do such things came from his trusteeship, his negligent doing was an individual misfeasance, giving a cause of action against him personally.

APPEAL by the defendant, Sumner Gerard, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 15th day of February, 1917, overruling his demurrer to the complaint.

*Carl S. Flanders*, for the appellant.

*William Adams Robinson*, for the respondent.

THOMAS, J.:

The complaint shows that Gerard, named as defendant, is in control of a tenement house by virtue of a trust authorizing it; that plaintiff became tenant therein, and that defendant was so negligent in doing things and omitting things relating to the maintenance of common stairs that plaintiff, using the stairs, was hurt. The action is against the individual, and the only question is whether it states a cause of action. The plaintiff asserts that a piece of metal on the stairs caused him to fall, and that defendant carelessly placed it there in an improper manner, and allowed it to become loosened and defective. There is an assertion of something affirmatively done by defendant followed by his neglect of it. His opportunity to do such things came from his trusteeship, but his negligent doing was individual misfeasance, occurring while he was purporting to do what his trust required. / That gives a cause of action against him personally, and requires the

overruling of the demurrer. Whether he was liable for non-feasance need not be taken from the consideration of the trial justice. It is enough now to decide that a person who as trustee of a building causes the stairways to be improperly and negligently repaired, and then lets that condition grow into further defect, whereby a tenant is injured, is not shielded from personal liability by reason of his trusteeship. The error in the statement of the costs is a matter for correction by motion.

The interlocutory judgment should be affirmed, with costs.

JENKS, P. J., PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Interlocutory judgment affirmed, with costs.

CONSUMERS COAL AND ICE COMPANY, Respondent, v. THE CITY OF NEW YORK and Others, Appellants.

Second Department, February 1, 1918.

**Waters and watercourses — rights in land under New York bay — navigation within bulkhead line — right of owner to fill in land under water — privately owned land under public water subject to navigation and to the municipal law — authority of commissioner of docks to authorize construction of temporary structures at request of Federal government — injunction.**

An owner of land under water extending into New York bay has the right to build a pier in front of its upland, but through its private ownership has no right to lateral waters over the land of adjacent proprietors.

Its private right of use is limited to the front of its shore or its extension into public waters. Whatever right it has to participate in public waters is subject to the vicissitudes of public regulation.

Navigation within the bulkhead line in New York bay may continue only to such time as the littoral owner avails itself of the right to fill in its land to the bulkhead line.

An owner of land under New York bay has no right to enjoin an owner of lateral waters from filling into the old bulkhead line, nor to enjoin the construction of basins therein for the harborage of vessels to meet the present national exigencies due to the war.

Section 819 of the Greater New York charter gives the commissioner of docks specific power to change pier head lines in specified places, but no

general authority is conferred upon him to change bulkhead lines, even temporarily.

With the approval of the sinking fund commission, the commissioner of docks can even change bulkhead lines, and where there has been accordingly concerted a plan that takes away from a littoral owner some 600 feet of the land that since 1857 could have been filled in by said owner or its predecessor, and the proposal is to confine the temporary structures within the old bulkhead to aid in meeting the nation's greatest exigency with all of the waters from the old bulkhead line unincumbered, a temporary injunction should not be granted in the absence of full proof of legal injury to a littoral owner.

Privately owned land under public waters is subject to the navigation of vessels over it, but cannot be appropriated by others to enlarge the berths at private piers.

Whether public waters are within bays or the three-mile limit on the open sea, they are subject to the municipal law within the exercised paramount right of Congress to regulate commerce, and the State, through the Legislature within such limitation may confer an exclusive privilege in tide waters or authorize a use inconsistent with the public right.

The commissioner of docks vested by the State with the control and government of waters under New York bay, being asked by the Federal government to provide a basin for the protection of neutral vessels, may authorize temporary structures within a limited area for such purpose, although the slip spaces previously given to an adjoining owner on either side of its pier by the sinking fund commission are thereby encroached upon, it appearing, however, that such owner will suffer no infringement of its private rights or property.

APPEAL by the defendants, The City of New York and others, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Richmond on the 10th day of January, 1918, granting an injunction *pendente lite*.

The plaintiff owns land under water, 100 feet wide, extending into New York bay from the foot of Medway street, and on it has a pier 40 feet in width, the northerly side of which is 10 feet from the northerly line of the land.

Measuring from the east line of Front street, plaintiff's pier extends about 1,500 feet into the bay, of which the outer 412 feet is beyond the bulkhead line fixed by the Secretary of War.

The Stapleton Dock and Warehouse Corporation owns adjoining lands under water north and south of plaintiff's

pier. On January 21, 1916, the dock commissioner adopted a plan for improvement of this water front (which the commissioners of the sinking fund afterwards approved). It established a bulkhead line only 500 feet east of the east line of Front street, from which were to project six piers, each 125 feet wide (with slips between, 275 feet in width), such piers to extend out to the United States pierhead line — a distance of about 1,300 feet.

The Stapleton Dock and Warehouse Corporation, however, had not done any filling, and had not erected any structure on this property.

In 1917 the United States authorities informed the commissioner of docks that they sought a location where a basin might be constructed to protect, against ice, neutral vessels and coal and other barges for such vessels. The commissioner of docks accordingly requested the Stapleton Company to put up such necessary structures. The Stapleton Company obtained from the defendant Henry Steers, Inc., an estimate for such a basin. Henry Steers, Inc., applied to the commissioner of docks for a permit for the erection of this temporary basin, requesting its issue "for the duration of the war and at least one year thereafter. They desire to proceed with this construction at once, to relieve the congestion now prevailing in the [New York] harbor." The permit was granted on December nineteenth, of which the applicant was advised by letter on December twenty-first. Such basin was to be formed by rows of piling with braces and supports forming mooring racks, to be placed and driven under the direction of the chief engineer of the department of docks. These lines of piling are to extend out to the bulkhead line fixed by the Secretary of War, and not that proposed by the dock commissioner's plan of 1916, and were to run along the boundaries ten feet from plaintiff's pier on one side and about thirty-five or forty feet on the other side. All this basin or cage was to be inside this bulkhead line.

Upon plaintiff's application, the court at Special Term, on January 9, 1918, continued an injunction against this structure, which order was on the condition that the appeal by defendants be brought on for immediate hearing in this court.

*William E. C. Mayer* [*William P. Burr, Corporation Counsel, Terence Farley and Edwin J. Freedman* with him on the brief], for the appellant The City of New York.

*Albert B. Boardman*, for the appellants The Stapleton Dock and Warehouse Corporation and another.

*P. E. Callahan*, for the respondent.

PER CURIAM:

The plaintiff asserts that it is entitled to have a clear water space of 100 feet on each side of its pier, and the defendants have been restrained from building a rack on such northerly side of plaintiff's land and a similar rack on the southerly side thereof "at a distance in violation of their line or water front as heretofore fixed by the Sinking Fund Commission of the said City of New York, on March 16th, 1916," which required the slips or basins to be 275 feet in width. The order is broader than the plaintiff's present contention that slips should be 100 feet wide. Indeed, plaintiff in its brief, as it did upon the argument, disavows any new rights under the plan of the sinking fund commission, and demands slips only 100 feet wide pursuant to the regulation provided by chapter 763 of the Laws of 1857 and section 2 of chapter 898 of the Laws of 1895. The latter act provides: "It shall be lawful for the owners of piers and bulkheads constructed or hereafter to be constructed, or the owners of land under water granted by the State of New York on the Staten Island side of the harbor of New York, to extend or construct piers not exceeding one hundred and fifty feet in width, with spaces between the same of at least one hundred feet, and bulkheads to the exterior bulkhead and pier lines respectively fixed and established by this act." The complaint shows that, as the plaintiff's pier was built before such act, it has done nothing pursuant to it. The Stapleton Company has not built any structure on its land. Plaintiff had the right to build a pier on the land in front of its upland (*Town of Brookhaven v. Smith*, 188 N. Y. 74), but through its private ownership has no right to lateral waters over the land of adjacent proprietors. (*Jenks v. Miller*, 14 App. Div. 474.) Its private right of use is limited

to the front of its shore or its extension into public waters. Whatever right it has to participate in public waters is subject to the vicissitudes of public regulation. (*People v. New York & Staten Island F. Co.*, 68 N. Y. 72.) Nor do I understand that plaintiff contends otherwise, but rather that the act of 1895, entitled "An act to establish the pier and bulkhead lines around Staten Island," is valid so far as its title expresses its purpose, that is, to fix pier and bulkhead lines, and the width of the slips. Section 818 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1904, chap. 741), among other things, invests the commissioner of docks "with the exclusive government and regulation of all wharf property, wharves, piers, bulkheads and structures thereon, and waters adjacent thereto, and all the basins, slips and docks, with the land under water in" the city of New York, although not owned by the city; and it is added: "The commissioner of docks shall not have power to change the exterior line of piers and bulkheads, established by law, except by the adoption of a plan or plans for the improvement of the water front of The City of New York \* \* \* by and with the approval of the commissioners of the sinking fund." It is such plan of the sinking fund commission of March 16, 1916, which among other things fixes slip spaces at the width of 275 feet that the Stapleton Company is forbidden to violate by this injunction order. But section 819 of the charter (as amd. by Laws of 1913, chap. 327) provides: "That said commissioner of docks may build, or rebuild, or license, or permit the building or rebuilding, of temporary wharf structures, and said commissioner may lease land covered with water belonging to The City of New York for the purpose thereof, such lease, or permit to continue and remain at the will and pleasure of said commissioner, or for a time not longer than until the wharves, piers, bulkheads, basins, docks, or slips to be built or constructed according to such plan or plans, shall in the judgment of said commissioner, require and need to be built or constructed." By the permit of December 19, 1917, the commissioner has permitted the Stapleton Company to build temporary wharf structures that are not inconsistent with the Laws of 1895, but do deviate from the plans of the commissioners of the sinking fund in that they would not leave

the space of 275 feet between piers. The proposed structures are wholly within the bulkhead as fixed by the Laws of 1895. Hence, even if they do interrupt navigation, the statute of 1895, if in force, would authorize it, for navigation within the bulkhead line may continue only to such time as the littoral owner avails himself of the right to fill in its land to the bulkhead line. If, then, the plaintiff gains nothing from the action of the sinking fund commission, the injunction must be dissolved, inasmuch as the plaintiff would have no cause of action to enjoin the Stapleton Company from filling in to the old bulkhead line, much less to enjoin the construction of basins therein for the harborage of vessels to meet the present national exigencies. But the court should not disregard the record, which shows that the sinking fund commission has changed the bulkhead line so that the proposed structures will extend beyond the new bulkhead line to the bulkhead line fixed in 1895. The question, then, is whether the commissioner of docks can authorize such temporary structures. We would not conclude that the commissioner of docks, without consent of the sinking fund commission, could change the bulkhead line as fixed by the plan. Section 819 of the charter gives him specific power to change pier head lines in specified places, but no general power to change even temporarily bulkhead lines is suggested. But with that line fixed, may he give permission to disregard the slip spaces 275 feet as prescribed? The intention is not to grant him the power to obliterate all water spaces between piers. That would be contrary to the history of legislation. It would result in the appropriation to private use of public waters. But the matter must be adjudged with some reference to the time and circumstances. Where, with the approval of the sinking fund commission, he can even change bulkhead lines, and there has been accordingly concerted a plan that takes away from a littoral owner some 600 feet of the land that since 1857 could have been filled in by the Stapleton Company or its predecessor, and the proposal is to confine the temporary structures within the old bulkhead to aid in meeting the nation's greatest exigency, with all of the waters from the old bulkhead line unincumbered, we would not grant a temporary injunction, in absence of full proof of



plaintiff's legal injury. (*Jenks v. Miller, supra.*) Plaintiff's pier will still project about 412 feet beyond the proposed basin, allowing for any necessary manœuvering of vessels to reach the front of its pier. It has not land enough on the north side to berth vessels without intruding on its neighbor's land, and on the south side has some 40 feet for that purpose. How, then, does the proposed structure injure facilities that are its own? Between the present plaintiff and the Stapleton Company it was adjudged on January 13, 1917, in *Williams v. Consumers Coal & Ice Co.*, that the present plaintiff was not entitled to use public waters over the land of the Stapleton Company for mooring vessels to the side of plaintiff's pier. The decision of Mr. Justice KELLY in that case accords with the correct rule that privately owned land under public waters is subject to the navigation of vessels over it, but cannot be appropriated by others to enlarge the berths at private piers. Whether public waters are within bays or the three-mile limit on the open sea, they are subject to the municipal law, within the exercised paramount right of Congress to regulate commerce, and the State through the Legislature within such limitation may "confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right." (*People v. New York & Staten Island F. Co.*, 68 N. Y. 78.) The State has vested in the dock commissioner the control and government of the waters in question, and he, solicited by the Federal officials, has invited the Stapleton Company to use a portion of such waters to furnish a protected harbor for vessels, leaving plaintiff ample room to approach the front of its dock or even its sides for a distance of about 412 feet. The permission is what was the Stapleton Company's right until March, 1916, and fits into plans for the execution of greatest national purposes. Such appropriation of public waters is limited in area and duration, and the right of the commissioner of docks to permit it must be measured in some degree by such considerations and the extremity of the needs, not of the Stapleton Company, but the public itself, and we conceive that from it the plaintiff suffers no infringement of its private rights or property. The plaintiff is naturally ruled by anxiety lest what seems temporary should abide, but unless in the future the bulkhead line

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should be restored, and it would be no injustice to do that, the courts can protect plaintiff under existing law. Indeed, should the commissioner of docks and the sinking fund commission bring out the bulkhead line to its position under the act of 1895, or otherwise modify it, the plaintiff would not have a semblance of just grievance.

The order should be reversed and the motion denied.

THOMAS, MILLS, PUTNAM and BLACKMAR, JJ., concurred;  
JENKS, P. J., not voting.

Order reversed, and motion denied.

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In the Matter of the Judicial Settlement of the Account of Proceedings of FRANK R. ABBEY, as Surviving Executor of and Trustee under the Last Will and Testament and Codicil Annexed Thereto of SYLVANUS T. WHITE, Deceased.

FRANCES LOUISE ABBEY, Appellant; FRANK R. ABBEY, as Surviving Executor and Trustee, and Others, Respondents.

Second Department, February 1, 1918.

**Will — trust — suspension of power of alienation — when codicil extending trust for third life may be disregarded.**

Where the general scheme of a will contemplated a trust for the lives of the testator's wife and daughter, but was subsequently extended by a codicil so as to include the life of a son-in-law if he survived his wife, the provision for the son-in-law may be disregarded in so far as it extends the trust for the third life in violation of the statute, and the remainder of the trust declared valid, the original scheme of the will being thereby left intact.

APPEAL by Frances Louise Abbey, sole heir at law and next of kin, from parts of a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 3d day of May, 1917.

The will of Sylvanus T. White, deceased, contained among other things a devise of his estate to trustees for the following purposes: "To pay the income received therefrom to my wife, Ella Louise White, for and during her natural life. In the event of the death of my said wife before my daughter, Frances Louise Abbey, then, to pay all the income received from said

estate to my said daughter, Frances Louise Abbey, for and during her natural life. In the event of the death of my said wife, and of my said daughter without issue, then I direct that my said estate be paid to my legal representatives then living." This was modified by a codicil which read as follows: "I hereby revoke that portion of the above will giving my estate to my legal representatives, and do hereby will that in case my son-in-law, Frank R. Abbey, survive his wife (Frances Louise Abbey) my daughter, that in that event, the entire income of my estate be paid to the said Frank R. Abbey, and at his death my estate be paid to my legal representatives then living."

At the date of testator's death, his wife, his daughter and his son-in-law were all alive. His wife subsequently died intestate. The decree, among other things, adjudged "that the provisions of the codicil so far as they seek to extend the trust for a third life, to wit, Frank R. Abbey's, are void" and "that the provisions of the will by which the trust estate is suspended for two lives, to wit, Ella Louise White's and Frances Louise Abbey's, are valid."

*William S. Allen*, for the appellant.<sup>7</sup>

*George S. Ingraham*, for the respondents Rice.

*William J. Mahon*, special guardian, for the respondents Eleanor Brown and others.

JENKS, P. J.:

We think that the rule of *Kalish v. Kalish* (166 N. Y. 368, 375) was applied properly to this case. In view of the appellant's contention that the rule was not to be extended to the case at bar, we cite *Underwood v. Curtis* (127 N. Y. 523); *Harrison v. Harrison* (36 id. 548); *Matter of Hitchcock* (176 App. Div. 326); *Leavitt v. Wolcott* (65 How. Pr. 51, affg. VAN VORST, J., at Special Term).

The general scheme of the will contemplated a trust for the lives of the testator's wife and daughter that was subsequently extended by the codicil so as to include the life of the son-in-law if he survived his wife. The excision by the court of the provision for the son-in-law left intact the original scheme, within the language of the Court of

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Appeals in the *Underwood* case (*supra*): "This can be done without in any manner interfering with the general scheme adopted by the testator for the disposition of his property. On the contrary, it is in furtherance of his wish to as great an extent as the courts may be permitted to go." (See, too, *Van Schuyver v. Mulford*, 59 N. Y. 426; approved in *Tilden v. Green*, 130 id. 50.)

The opinion of Surrogate KETCHAM makes any further discussion unnecessary. We are in accord with the view taken by him (98 Misc. Rep. 506).

The decree of the Surrogate's Court of Kings county, in so far as appealed from, is affirmed, with costs, and an allowance to the special guardian, to be paid out of the estate.

THOMAS, RICH and BLACKMAR, JJ., concurred.

Decree of the Surrogate's Court of Kings county, in so far as appealed from, affirmed, with costs, and an allowance to the special guardian, to be paid out of the estate. Order to be settled before the presiding justice.

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AMBROSE SCHALL, Respondent, v. SCHWARTZ & COMPANY, INC., Appellant.

Second Department, February 1, 1918.

**Trial — when question of fact arises — equity — suit for reformation of lease upon ground of mistake — presumption from reading written lease in evidence — burden of proof — admission against interest — verdict against weight of evidence.**

When one reasonable mind can infer from all the evidence that a controlling fact was proved, while another reasonable mind can infer that it was not proved, a question is presented for the jury.

A question of fact arises if conflicting inferences may be drawn from uncontradicted evidence.

Where, in a suit by the assignee of a lessee for the reformation of a written lease, upon the ground of mistake, the reading of the lease in evidence created a presumption against the defendant, and cast the burden upon him, the fact that there was no witness whose testimony was contradictory or contrary to the testimony of witnesses called by the defendant, did not put it in the category of one whose case is not opposed to direct evidence.

Since the original lessee had assigned the lease to the plaintiff and apparently was not interested in the event of the suit, the testimony adduced from her and her agents was not in effect an admission against interest.

The question whether the parties to the original lease both intended that the words "disposes of" should be "is dispossessed" or "be dispossessed" was submitted to the jury. *Held*, that a verdict founded on a finding against the theory of mistake was against the weight of the evidence.

APPEAL by the defendant, Schwartz & Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 13th day of June, 1917, upon the verdict of a jury.

*Abraham H. Sarasohn*, for the appellant.

*Almet R. Latson, Jr.*, for the respondent.

JENKS, P. J.:

The learned court submitted to the jury the question whether the parties to the original lease both intended that the words "disposes of" should be "is dispossessed" or "be dispossessed." The verdict for the plaintiff imports that the jury found against the theory of mistake. The appellant at trial protested against such submission, and now insists that it was error. The proposition of the learned counsel for the appellant is that "there was no conflict in the testimony upon said issue nor could different inferences be drawn therefrom," and, therefore, the rule expressed in *Hull v. Littauer* (162 N. Y. 572), and in many other judgments cited, applies.

It is argued that the defendant is sustained by the testimony of all who were present at the execution of the lease. These persons were Schwartz, the president of the defendant, who executed the lease on its behalf; Helfand, its treasurer; Geiger, the original lessee; her father, who was her agent, and the attorney for the defendant, who dictated the lease to his stenographer to be typed by her. It may be noted that the stenographer and typist was not called as a witness, nor was her absence accounted for. The rule does not apply when, upon all of the evidence, "One reasonable mind can infer \* \* \* that a controlling fact was proved, while

another reasonable mind can infer that it was not proved." (*Gordon v. Ashley*, 191 N. Y. 193, citing *Matter of Totten*, 179 id. 112, 116. See, too, *Kelly v. Burroughs*, 102 N. Y. 95, where the court comments that there was no conflict in the evidence, "or any thing or circumstance from which an inference against the fact testified to by him could be drawn.") A question of fact arises if conflicting inferences may be drawn from uncontradicted evidence. (*Ga Nun v. Palmer*, 216 N. Y. 611.) And in *Hull v. Littauer* (*supra*, 572) the general rule is limited by the language "If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it." The fact that there was no witness whose testimony was contradictory or contrary to the testimony of these witnesses called by the defendant, did not put the defendant in the category of one whose case is not opposed to direct evidence. The plaintiff had read in evidence the written lease. A "strong presumption" against the defendant arose from its terms. (*Howland v. Blake*, 97 U. S. 626; *Insurance Co. v. Nelson*, 103 id. 548.) And the terms thereof were sufficient to cast the burden upon him. (*Id.*) In *Christopher St. R. Co. v. 23d St. Ry. Co.* (149 N. Y. 58) the court say: "In an action for the reformation of a written instrument upon the ground of mistake, the party seeking the reformation must prove that there was a mistake by evidence that is clear, positive and convincing. It is to be presumed that the written instrument was carefully and deliberately prepared and executed, and, therefore, is evidence of the highest character and will be regarded as expressing the intention of the parties to it until the contrary appears in the most satisfactory manner." Nor can it be said with the positiveness that is contemplated by the rule (See *Hull v. Littauer*, *supra*, 572) that the evidence is *not* "possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts." It is to be noted that the original lessee had assigned the lease to this plaintiff and apparently was not interested in the event, so that the testimony adduced from

her and her agents was not in effect an admission against interest.

Not without hesitation due to the character of proof required (*Southard v. Curley*, 134 N. Y. 148; *Jamaica Savings Bank v. Taylor*, 72 App. Div. 567), I have reached the conclusion that the judgment and order should be reversed and that a new trial should be granted, for the reason that the verdict upon the issue of mistake was against the weight of the evidence. I have taken into consideration the attitude of the witnesses, and my conclusion that the word "disposes" does not seem pertinent in view of the provision in the lease that affords the lessee the right to assign the lease without the landlord's consent to any third person who is amply responsible, except to an Italian or negro; while the word "dispossess" is more apt, both in purpose and in association in the expression "If the party of the second part surrenders said premises, or disposes thereof [is dispossessed thereof] prior to the expiration of this lease."

The judgment is reversed and a new trial is granted, costs to abide the event.

THOMAS, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

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SARAH KANTOR, Appellant, v. JOSEF COHN, Respondent,  
Impleaded with ISSY GOLDBERG and JOHN RAINEY,  
Defendants.

Second Department, January 25, 1918.

**Dower — when widow estopped as against bona fide purchasers —  
rabbinical divorce — rights of grantees of bona fide purchasers.**

Where a wife, as complainant, procures a rabbinical divorce, acquiesces in the remarriage of her husband, and is herself subsequently remarried and lives with her second husband for twenty-three years, she is estopped from claiming dower in the lands of her first husband which had been conveyed by him to *bona fide* purchasers by deeds in which his second wife joined, releasing her dower.

Grantees of such *bona fide* purchasers have all the rights of the original grantees from the plaintiff's divorced husband, and need not show their personal reliance upon his apparent marital status.

APPEAL by the plaintiff, Sarah Kantor, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of Kings on the 19th day of April, 1917, dismissing the complaint on the merits upon the decision of the court after a special verdict had been rendered by direction of the court.

The action was brought to recover dower in land on Vermont street, borough of Brooklyn, formerly owned by plaintiff's first husband, Solomon Rubin, who died in Connecticut on August 28, 1911. Plaintiff and Rubin originally lived in Russia, where they were married according to Jewish forms before a rabbi, in the year 1879. They lived together in Russia seven years, having three children; then Rubin came to this country in 1886. In 1889 he sent for his family, who came out and rejoined him. They lived together in Orange county and afterwards in Kings county.

About 1893 plaintiff separated from Rubin by means of a Jewish divorce. First she received a paper from a man named Burger, which he called a divorce. Then by ancient rabbinical custom she and Rubin appeared together before a rabbi, who first told plaintiff that this was not by her fault. He inquired of her whether, if Rubin should change his character, she would again live with him. She said it was impossible, that she could not stand it any longer. Thereupon the rabbi gave plaintiff the "get," or divorce, written in Hebrew, which she took. In three months Rubin went through a rabbinical marriage ceremony with a woman named Lena, and a few months later plaintiff in like manner married a man named Kantor, and went with him to Kansas City, where they lived as man and wife for twenty-three years.

In the meantime Rubin purchased and conveyed real estate. The property described in the complaint was one of several lots, the title to which Rubin had held for three days in April, 1904. In conveying this land his *de facto* wife, Lena, had joined in the deed and purported to relinquish all rights of dower. Defendant's predecessors in title took such conveyance in good faith. After Rubin's death plaintiff brought this suit for dower. She joined as defendants certain persons having rights as occupants in the land. The learned court dismissed the complaint, holding that plaintiff had



estopped herself from claiming such right of dower (*Kantor v. Cohn*, 98 Misc. Rep. 355), from which plaintiff appealed.

*Isidor J. Kresel*, for the appellant.

*Emanuel Tacker* [*Samuel Kahan* with him on the brief], for the respondent.

*Lynn C. Norris*, filed a brief as *amicus curiæ*.

PUTNAM, J.:

The man Rubin and his wife, coming in middle life to this country, naturally kept to the habits and ceremonies sanctioned by rabbinical authority. (See, *Matter of Spondre*, 98 Misc. Rep. 524.) The power to give a "get," or bill of divorce, though surrounded with forms to prevent hasty or capricious separations, was regarded as a matter of religious observance. Jewish writers required that the rabbi should be satisfied that there were sufficient grounds. He must, however, first seek to reconcile the parties. The rabbi's efforts for conciliation having been met by her refusal, he delivered to her the "get," which upon her marriage she gave to Kantor as a credential attesting her freedom to remarry. Such a "get" closes with the solemn words, in Hebrew:

"And this shall be unto thee, from me, a bill of divorce, a letter of freedom, and a document of dismissal, according to the law of Moses and Israel." (*Mielziner Jewish Law of Divorce*, 129; *Amram Jewish Law of Divorce*, 158.)

By Hebrew law, the woman thus freed by divorce could not marry for three months thereafter. (*Amram Jewish Law of Divorce*, 108.) In 1791, Lord KENYON received testimony of a Jewess (without producing any document) proving a divorce *more judaico* in Leghorn, and thus established the validity of her own divorce. (*Ganer v. Lady Lanesborough*, Peake N. P. 17.)

Plaintiff's reliance on this divorce appears from her remarriage and subsequent married life with Kantor, by whom she had two children, aged at the time of the trial respectively twenty and seventeen years. Nevertheless, on the death of Rubin in Connecticut, plaintiff though still living with Kantor as his wife, took proceedings in the Connecticut Probate Court to have the administrator of Rubin's estate removed

and letters issued to her as the lawful widow. This was denied, because of the Connecticut statute as to the effect of an abandonment by either husband or wife if continued until the other's death. (*Kantor v. Bloom*, 90 Conn. 210.)

We agree with the learned trial court that plaintiff is now estopped to assert dower claims in the lands that are the subject of her action. Such estoppel is upon the combined grounds (a) the rabbinical divorce, wherein she was the complainant; (b) her knowledge of Rubin's remarriage with her acquiescence; (c) her own remarriage, followed by twenty-three years consortium with Kantor.

Silence may amount to negligence to the injury of another, if there be a duty to speak. Plaintiff herself asserted and obtained her marital freedom according to Jewish custom. By that means she entered into consortium with Kantor. Since Rubin's death has removed the impediment, that relation may eventually give her a legal status as Kantor's widow. She cannot in fairness now make the inconsistent claim of dower as widow of Rubin; still more is she estopped as to *bona fide* purchasers, who took lands from Rubin, relying on the release of dower given by plaintiff's successor as Rubin's wife. (*De France v. Johnson*, 26 Fed. Rep. 891; *Wright Lumber Co. v. McCord*, 145 Wis. 93; *Wilson v. Craig*, 175 Mo. 362; *Richardson's Estate*, 132 Penn. St. 292; *Gilbert v. Reynolds*, 51 Ill. 513; *Hilton v. Sloan*, 37 Utah, 359.)

Even where a wife in Massachusetts took by default a decree of divorce without jurisdiction having been acquired over the defendant, such voidable decree estopped her from claiming dower rights in New York. (*Starbuck v. Starbuck*, 173 N. Y. 503.) True, this plaintiff made no personal representations by speech or writing. But the solemn acts performed under the sanction of Jewish communal usage, followed by a daily conduct consistent with such renunciation for twenty-three years, debar this divorcee from now undoing her renunciation of her husband, and casting dishonor on her later family, and clouding the parentage of innocent children.

Her dower claims, now sought to be revived, might work damage to innocent purchasers in good faith who bought in reliance upon Rubin's deed joined in by the wife Lena. Rubin held her out, so that she was recognized as a lawful wife.

In view of Jewish custom, plaintiff may be deemed to have contemplated that very situation. The "get" meant freedom to Rubin as well as to herself. It is more than mere silence and acquiescence. As one is deemed to intend the natural consequence of his acts, plaintiff is to be regarded as acting with an intent and purpose to let Rubin remarry, and thereby to mislead strangers to whom he might sell land. Hence, after such sales, she cannot rightly assert a dower right thus concealed, as against *bona fide* purchasers misled, as she must have expected they would be misled, because of her conduct. And defendant stands in the shoes of the original grantees from Rubin, and need not show his personal reliance upon Rubin's apparent marital status. (*Wood v. Chapin*, 13 N. Y. 509; *Lacustrine Fertilizer Co. v. L. G. & Fer. Co.*, 82 id. 476, 483.)

The judgment dismissing the complaint on the merits should, therefore, be affirmed, with costs.

JENKS, P. J., THOMAS, BLACKMAR and KELLY, JJ., concurred.

Judgment dismissing complaint on the merits affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. PHILIP TEITELBAUM, Appellant, v. WILLIAM F. RYAN, Acting Detective Sergeant, Police Officer, City of New York, Respondent.

Second Department, January 25, 1918.

**Crime — extradition — habeas corpus — traverse of return — evidence — burden of proof — competency of evidence as to former conviction.**

Upon a petition by a person charged with being a fugitive from justice for a writ of habeas corpus, the identity of the name of such person with the name of the person named in the rendition warrant raises a presumption that the persons are the same.

A traverse of the return to such a petition raises an issue of fact to be determined by the court as to the preponderance of the evidence with the burden upon the relator.

Evidence examined, and held, insufficient to overcome the presumptive *prima facie* case made out by the rendition warrant that the relator was the fugitive from justice sought.

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Habeas corpus is not the proper proceeding to try the question of a relator's guilt or innocence of the crime charged, the proceeding being limited to the determination of whether the person held in custody is or is not a fugitive from justice as charged.

Evidence on such a proceeding as to a former conviction of the relator is competent for the purpose of establishing identity.

As such evidence could have had no prejudicial influence upon the court in determining the question as to whether or not the relator was a fugitive from justice, it is the duty of the appellate court to disregard it under section 542 of the Code of Criminal Procedure.

APPEAL by the relator, Philip Teitelbaum, from an *ex parte* order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 15th day of November, 1917, amending a prior order dismissing and quashing a writ of habeas corpus allowed on behalf of the relator and ordering "that the officer entrusted with the execution of the said warrant of the Governor deliver the prisoner into the custody of the agent designated in the requisition and warrant issued thereon as the agent of the Commonwealth of Massachusetts to receive him."

K. Henry Rosenberg, for the appellant.

Harry G. Anderson, Assistant District Attorney [Harry E. Lewis, District Attorney, with him on the brief], for the respondent.

RICH, J.:

The appellant was arrested charged with being a fugitive from justice, and upon his petition in which he denied that he was the person named in the warrant, or wanted by the Massachusetts authorities for the crime for which extradition was granted, or that he was in that State on the date of the alleged commission of such crime, or was a fugitive from justice, a writ of habeas corpus was allowed at Special Term. The respondent returned that he held the relator under a rendition warrant, reciting that "Philip Teitelbaum, otherwise called Philip Silbert, stands charged in the county of Suffolk, Commonwealth of Massachusetts, with the crime of larceny of money over one hundred dollars in value, and has fled therefrom and taken refuge in the State of New York, and requiring and commanding that the said Philip Teitelbaum,

otherwise called Philip Silbert, be arrested and secured wherever he may be found within the State and thereafter and after compliance with the requirements of section 827 of the Code of Criminal Procedure, to deliver him into the custody of Thomas M. Towle, the agent duly authorized to receive him into custody and convey him back to the Commonwealth of Massachusetts." A copy of the rendition warrant was annexed to the return.

The relator traversed the return, denying that he was the individual named in the warrant of extradition; that he was or ever had been a fugitive from Massachusetts or that he ever committed a larceny from any one in Massachusetts. Later in the proceeding the traverse was amended by including a specific denial that the relator was in the State of Massachusetts on the 29th day of May, 1917, or on that day left the State of Massachusetts and became a fugitive from that State, or on that day committed any crime of larceny in that State. For the purpose of fixing the date upon which the alleged larceny was committed, the court received a copy of the indictment against "Philip Titelbaum" in evidence without objection, and, after denying the relator's motion that before he offered any proof the district attorney be compelled to offer proof of identification that he was the identical person wanted in the State of Massachusetts under the name of Philip Titelbaum or Philip Silbert, proceeded to take the evidence presented by the respective parties, after which the order appealed from was made. The relator contends that upon the filing of his traverse it became incumbent upon the district attorney to assume the affirmative on the issues, and offer evidence in support of the facts set up in the return, and that the burden of proof rested upon the demanding State to establish its claim that the relator was the person named in the rendition warrant, and that it was error to deny his motion to compel the respondent to assume the burden of proof. I do not so understand the law. The identity of the name of the relator with the name of the person named in the rendition warrant, raised the presumption that the persons were the same, as we held in *People ex rel. Epstein v. Patton* (177 App. Div. 933), and as has been uniformly held by the courts in the many authorities to

which our attention is directed in the brief of the respondent. The traverse, which is a pleading, raised an issue of fact to be determined by the court, as to the preponderance of evidence (*People ex rel. Genna v. McLaughlin*, 145 App. Div. 513), with the burden on the relator. It was for the Special Term to determine the weight of the evidence and credibility of the witnesses, and I think that his conclusion that upon the whole evidence the relator had failed to overcome the presumptive *prima facie* case, made out by the rendition warrant, that he was the fugitive from justice, was justified and should be sustained. The demand of the Commonwealth of Massachusetts for relator's extradition should be honored, it not having been made to appear clearly that he is not the person so demanded. (*People ex rel. Edelstein v. Warden of City Prison*, 154 App. Div. 261.) Habeas corpus is not the proper proceeding to try the question of the relator's guilt or innocence of the crime charged, the proceeding being limited to the determination of whether the person held in custody is or is not a fugitive from justice as charged, and unless it is made to satisfactorily appear that he is not, he should not be discharged from custody. (*McNichols v. Pease*, 207 U. S. 100, 112.)

It is further contended that it was error for the learned Special Term to permit evidence of a former conviction. The fact that the relator had, prior to the trial in the case at bar, served a term in prison, was first brought out on the cross-examination of relator's witness Goldberg, without objection. In answer to the question of the district attorney, "Did you miss him for a long time?" the witness answered, "I missed him a couple of years. He was in prison." Later, when the respondent was on the stand, he was asked by the district attorney, "When was the last time you saw him before you arrested him this time? A. June, 1914. Q. Where? A. I brought the defendant, Philip Titelbaum, from the office of the Auburn prison June 23, 1914, under an indictment for robbery." The relator did not object until after the witness had fully answered the question, and then the court expressly limited the effect of the testimony objected to, to identity. I regard the evidence competent for the limited purpose for which it was received, but in any event it could have had no

appreciable or prejudicial influence upon the court in determining the question before him, and it is, therefore, our duty to disregard it. (Code Crim. Proc. § 542.)

The remaining exceptions argued do not present reversible error, and the order must be affirmed.

JENKS, P. J., THOMAS, MILLS and PUTNAM, JJ., concurred.

Order affirmed.

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In the Matter of the Judicial Settlement of the Estate of  
SUSAN COLWELL, Deceased.

MARY LIBBIE RAYNOR, Appellant; LIBBIE S. BURNABY and  
ELLA R. COLWELL, as Executrices, etc., of SUSAN COLWELL,  
Deceased, Respondents.

Second Department, January 11, 1918.

**Decedent's estate — real property — right of life tenant to possession,  
control and management of estate.**

A legatee to whom the net estate of a decedent has been bequeathed for and during her natural life, with remainder over upon her death, is entitled to the possession, control and management of the estate, upon giving proper and adequate security for the payment and delivery of the corpus of the estate to the remaindermen upon her death.

Hence, where a testatrix left the remainder of her estate, both real and personal, to her sister for life, with remainder to her nephews and nieces, the sister has the absolute right, upon tender of adequate and proper security, to have the net estate paid over to her.

APPEAL by Mary Libbie Raynor from part of a decree of the Surrogate's Court of the county of Orange, entered in the office of said Surrogate's Court on the 30th day of July, 1917, directing among other things that the residue of the estate herein be paid to the executrices and be invested by them during the lifetime of the appellant who was the life tenant.

*M. N. Kane*, for the appellant.

*F. V. Sanford*, for the respondents.

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RICH, J.:

Mary Libbie Raynor, a sister of Susan Colwell, deceased, one of the executrices and the life tenant under her last will and testament, appeals from so much of a decree of the Surrogate's Court of Orange county as directs the residue and remainder of the estate of the deceased, remaining in the hands of the executrices, to be paid to Libbie S. Burnaby and Ella R. Colwell, as executrices, to be by them invested during the lifetime of the appellant and the income thereof paid to her in semi-annual payments. Susan Colwell died March 8, 1916, leaving a last will and testament which provided that after the payment of her just debts and funeral expenses "All the rest, residue and remainder of my estate of every kind and description, both real and personal property, I give, devise and bequeath to my sister, Mary Libbie Raynor for and during the term of her natural life, at and upon her death, I give and devise the remainder to my nephews and nieces, equally share and share alike." The nephews and nieces are then severally named and provision made for the disposition of the property in case of the death of either. The appellant and respondents were named as executrices, and have duly qualified as such. On the judicial settlement of their account it was found that they had in their hands, after paying the debts of the decedent and expenses connected with the administration, a net balance of \$10,480.52. The appellant asked on the accounting that the net estate, which was given her for life, be paid over to her upon her giving security in the form of a bond with surety or sureties to be approved by the surrogate, conditioned for the payment of the entire corpus of said estate to the remaindermen upon her death. Her application was denied, and the decree appealed from was thereupon made. This was erroneous, and so much of the decree as is appealed from must be reversed. Our attention is not directed to any authority limiting the rule in this State, that a legatee to whom the net estate of a decedent has been bequeathed for and during her natural life, with remainder over upon her death, is entitled to the possession, control and management of the estate, upon giving proper and adequate security securing payment and delivery of the corpus of the estate to the remaindermen



upon her death. (*Livingston v. Murray*, 68 N. Y. 485.) Cases have arisen presenting the question as to whether such an estate should be paid over to the life tenant without such security being given, but the absolute right to its payment and delivery when adequate and proper security has been tendered has never, so far as I am advised, been questioned. (*Matter of McDougall*, 141 N. Y. 21; *Matter of Rowland*, 153 App. Div. 327; *Matter of Camp*, 126 N. Y. 377, 384, 385.) The appellant is entitled, upon filing a bond with sufficient sureties, approved as to form, amount and sufficiency by the surrogate of Orange county, conditioned for the payment of the whole corpus of the estate to the remaindermen upon her death, to the possession and management of the net estate of the testatrix during her life.

The decree of the Surrogate's Court of Orange county, in so far as appealed from, is, therefore, reversed, with costs to the appellant to be paid from the estate, and the proceeding is remitted to that court for the entry of a decree that will conform with this decision.

JENKS, P. J., THOMAS, PUTNAM and BLACKMAR, JJ., concurred.

Decree of the Surrogate's Court of Orange county, in so far as appealed from, reversed, with costs to the appellant to be paid from the estate, and proceeding remitted to said court for the entry of a decree that will conform to this decision.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. PHILIP GOLDFARB, Appellant, v. JOHN J. GARGAN, a Police Officer of the City of New York, Respondent.

Second Department, February 1, 1918.

**Habeas corpus — extradition — indictment in foreign State for crime of false pretenses — immaterial that defendant did not remain until consummation of crime — indictment and merits of defense not considered.**

A person is properly committed for extradition to another State and his writ of habeas corpus should be dismissed where it appears that he was present in the foreign State at the time he made alleged false represen-

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tations for which he was indicted, even though he did not remain in the foreign jurisdiction until the consummation of the crime.

The court on such writ of habeas corpus will not go into the sufficiency of the indictment or the merits of the defense which are matters for the foreign court.

APPEAL by the relator, Philip Goldfarb (who had been committed for extradition to Pennsylvania), from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 19th day of November, 1917, dismissing a writ of habeas corpus and directing that the relator be delivered into the custody of the agent designated in the rendition warrant issued by the Governor of the State of New York.

*Sydney Rosenthal*, for the appellant.

*Harry G. Anderson*, Assistant District Attorney [*Harry E. Lewis*, District Attorney, with him on the brief], for the respondent.

PUTNAM, J.:

On the hearing of the writ of habeas corpus it appeared that relator had been indicted in Pennsylvania for the crime of false pretenses, charged as committed on August 16, August 21 and August 25, 1917. Relator denied being a fugitive from the justice of the State of Pennsylvania, and set up by affidavit that he was not in that State "on any of the dates mentioned or thereabouts."

Relator's evidence tended to show his presence in the State of New York on and after August nineteenth. There was, however, testimony that he was in Philadelphia on August sixteenth at the occasion of his handing two checks to a certain witness there. Relator's presence in the demanding State when the false statement was made, or at the inception of the crime, entitles that State to extradite him for trial, even if he did not remain there until the consummation of the crime. (*Strassheim v. Daily*, 221 U. S. 280; *Matter of Cook*, 49 Fed. Rep. 833; *Ex parte Hoffstot*, 180 id. 240; *sub nom. Hoffstot v. Flood*, 218 U. S. 665.)

The court rightly refused to go into the sufficiency of the indictment or the merits of the defense, which are matters

for the courts of Pennsylvania. (*People ex rel. Himmelstein v. Baker*, 137 App. Div. 824, 825; *Drew v. Thaw*, 235 U. S. 432, 439.)

The order dismissing the writ should, therefore, be affirmed.

JENKS, P. J., THOMAS, BLACKMAR and KELLY, JJ., concurred.

Order dismissing writ affirmed.

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MAX HOFFMAN, Appellant, v. PRUSSIAN NATIONAL INSURANCE  
COMPANY OF STETIN, GERMANY, Respondent.

Second Department, January 11, 1918.

**Insurance — action on policy of automobile insurance — effect of proof of actual value upon right to urge upon appeal valuation stated in policy — fraud — overvaluation — evidence by photographic enlargements as to change in consideration in prior bill of sale.**

Where, in a policy of automobile insurance, the plaintiff's car was "valued at the sum insured," but the plaintiff alleged and sought to prove the actual value of the car by evidence of what it cost him, and also of what it cost his vendor, he cannot on appeal urge that the valuation stated in the policy is controlling.

A general verdict for the defendant in such a case imports not merely a failure to establish the value claimed, but may be taken as a finding that the car was insured at such an overvaluation as to amount to fraud avoiding the policy.

Plaintiff having introduced as an exhibit a prior bill of sale of the car to which he was not a party, evidence, by photographic enlargements showing that the consideration therein had been raised, was competent.

APPEAL by the plaintiff, Max Hoffman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 3d day of May, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 1st day of May, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*David Goldstein*, for the appellant.

*Joab H. Banton*, for the respondent.

PUTNAM, J.:

In defendant's policy, plaintiff's Mercedes car was "valued at the sum insured," namely, \$1,800. The complaint and plaintiff's direct case sought to prove value of the car, by evidence of what the car cost plaintiff, and then, going a step further, by showing how much it cost plaintiff's vendor. Where the plaintiff did not stand on the agreed valuation, but treated the evidence as proving value under an open policy, he cannot change front on appeal, and urge that the policy valuation controlled. After the issue of value had been fully tried out, it was submitted to the jury by a charge of entire fairness, and free from exception. A general verdict for defendant thus imports not merely a failure to establish the value claimed. It may be taken as a finding that a worn-out car was insured at a sum so much beyond its worth that the gross overvaluation amounted to affirmative fraud upon the insurer. And this avoids a valued policy. Even if plaintiff were not party to the bill of sale from Rosensen to Suderov, the evidence, by photographic enlargements, that such consideration expressed in the bill of sale had been raised from \$800 to \$1,800, was competent, after plaintiff had first made this bill of sale his exhibit. The verdict was right and just.

The judgment for defendant and order are, therefore, affirmed, with costs.

JENKS, P. J., THOMAS, MILLS and RICH, JJ., concurred.

Judgment and order affirmed, with costs.

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INNES GETTY, Respondent, v. ROGER WILLIAMS SILVER COMPANY, Appellant.

First Department, December 31, 1917.

**Master and servant — action for wrongful discharge — defense — negligence of employee — verdict against weight of evidence.**

In an action by an employee against his employer to recover damages for an alleged wrongful discharge, the defendant sought to justify on the ground that the plaintiff had been guilty of negligence in conducting defendant's business, resulting in a substantial loss of property.

*Held*, that a verdict in favor of the plaintiff was against the weight of the evidence, and that a judgment entered thereon should be reversed and a new trial ordered.

APPEAL by the defendant, Roger Williams Silver Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York upon the verdict of a jury, and also from an order entered in said clerk's office denying defendant's motion for a new trial made upon the minutes.

*Stephen P. Anderton* of counsel [*Beekman, Menken & Griscom*, attorneys], for the appellant.

*A. C. B. McNevin* of counsel [*Martin L. Stover* with him on the brief; *Hardie B. Walmsley*, attorney], for the respondent.

SCOTT, J.:

This is an action by an employee against his employer to recover damages for a discharge, which defendant sought to justify on the ground that the plaintiff had been guilty of culpable negligence in conducting defendant's business resulting in a substantial loss of property.

The plaintiff had a verdict, which necessarily involved a finding by the jury that he had not been negligent as charged. Upon appeal to this court we were of opinion that the undisputed evidence had clearly established the fact of plaintiff's negligence and that the finding of the jury that he had not been negligent was against the evidence and dismissed the complaint. (162 App. Div. 513.)

On appeal to the Court of Appeals that court considered that there was a question of fact in the case, in that, although there was no question as to the facts, they were such that different inferences might be drawn therefrom. (221 N. Y. 38.) Consequently the cause was remitted to this court for consideration of the weight of the evidence.

Unless we are required by the Court of Appeals to draw different inferences from the facts than those which we drew upon the former appeal, which I do not understand to be the effect of the decision of that court, there is nothing left for us to do except to order a new trial.

On the former appeal we were of the opinion that the ver-

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dict was absolutely *against* the evidence. Being still of that mind we are obliged of necessity to hold that it is *against the weight* of the evidence.

It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to appellant to abide the event, the finding that the plaintiff was not negligent in the conduct of defendant's business being reversed as against the weight of the evidence.

CLARKE, P. J., PAGE and SHEARN, JJ., concurred; SMITH, J., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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KOHN & BAER, Respondent, v. I. ARIOWITSCH Co., INC.,  
Appellant.

First Department, February 1, 1918.

**Statute of Frauds — memorandum in writing — acceptance by  
parol — sale — action by vendee for breach of contract —  
evidence.**

A definite offer in writing signed by a vendor is sufficient to charge him, even though the acceptance be by parol.

Hence, in an action by a vendee under an executory contract for the sale and delivery of skins to recover damages for the failure of the vendor to perform, there being a sufficient memorandum in writing signed by the defendant, within the Statute of Frauds, it was competent for the plaintiff to show a parol acceptance given by the defendant on the same day. Since there was no reference in the contract to a sample, the action cannot be sustained on that theory.

As the contract was indefinite with respect to the grade or quality of skins, and there was no evidence with respect to the manner in which such skins are dealt in or with respect to any custom, a verdict on the basis of a market price considerably higher than the minimum price, depending on the grade or quality of the skins, should not be permitted to stand.

APPEAL by the defendant, I. Ariowitsch Co., Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 11th day of June, 1917, upon the verdict of a jury,

and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

*Abraham Rosenstein* of counsel [*Feltenstein & Rosenstein*, attorneys], for the appellant.

*Aaron Honig*, for the respondent.

LAUGHLIN, J.:

The action is brought by the vendee under an executory contract for the sale and delivery of muskrat skins to recover damages on the ground that the vendor failed to perform. No consideration was paid and the contract was performed neither in whole nor in part. The important questions presented by the appeal arise on the defendant's plea of the Statute of Frauds. Both parties are domestic corporations.

The plaintiff claims and the trial court held that there was a sufficient memorandum in writing signed by the defendant within the Statute of Frauds. It is uncontroverted that on the 31st of August, 1915, one Louis D. Baer, the president of the plaintiff, called at the defendant's place of business and had a conversation with Abraham Cohen, the president of the defendant, concerning an option to purchase or the purchase of muskrat skins, and that as a result of these negotiations an instrument in writing was signed and executed as follows:

" Date Aug. 31st, 1915.

" Order No.

" M. .... Ariowitsch & Co.

" Ship to

" At City

" How ship When

" Terms

" Salesman Buyer

" Mr. Cohen gives me the refusal on 10,000 Ten thousand Seal Dyed Rats Hollanders Dye to be delivered from Sept. 1st to 30th at 62½c if not delivered in Sept. such as soon as they are delivered.

" KOHN & BAER

" A. COHEN."

Baer signed the plaintiff's name and Cohen signed his own name but it was conceded that Cohen was acting for and on behalf of the defendant and had authority to make the contract and to bind the defendant, and no point was made upon the trial or upon the appeal with respect to his having signed his own name instead of the name of the corporation. The theory of the plaintiff is that the written contract constituted an option and that it was accepted verbally by the president of the plaintiff on the same day and thereupon became binding upon both parties. It is well settled that a definite offer in writing signed by a vendor or purchaser is sufficient to charge him even though the acceptance be by parol. (*Justice v. Lang*, 42 N. Y. 493; *Mason v. Decker*, 72 id. 595; *Bristol v. Mente*, 79 App. Div. 67.) It was competent, therefore, for the plaintiff to show a parol acceptance of the option given by the defendant to it to purchase the skins. A definite, unequivocal acceptance on the same day was shown by the testimony of Baer which was corroborated. That testimony was controverted and presented a question of fact which was submitted to the jury. On that aspect of the case the evidence on the part of the plaintiff was sufficient to sustain the verdict.

The defendant, however, further contends that the contract is uncertain and ambiguous with respect to the skins which were to be sold by the defendant. It is not contended and, of course, could not be successfully, that the meaning of the words used in the contract could not be shown by parol. It appears by the uncontroverted evidence that it referred to muskrat skins designed for use in making furs known as Hudson Bay seal or seal and dyed by a process known as Hollander's dye. There is no question raised with respect to the writing being sufficiently definite concerning the time of delivery which was to be between the first and thirtieth days of the following month or as soon as the skins were delivered to the defendant by the dyer. The point made is that the contract is indefinite with respect to the grade or quality of the skins. The president of the plaintiff testified that the sale was by sample, and that Cohen showed him a sample of dyed seal or muskrat skins during the negotiations and prior to the signing of the contract. It is manifest



that the action cannot be sustained on that theory for there is no reference in the contract to a sample. The evidence is uncontroverted that on the twenty-seventh or twenty-eighth of September after the making of the contract plaintiff's president was notified by telephone that the defendant had received about 10,000 skins from the dyer and was requested to call and examine them, and that he stated that he was unable to call that day but would call the next morning. On the part of the plaintiff testimony was given to the effect that the defendant acquiesced in this; but on the part of the defendant the testimony was to the effect that the plaintiff requested that some of the skins be sent to it on memorandum and that this was declined, and that plaintiff's president was informed that there were customers at the defendant's store at the time and that unless he came down that day defendant would sell the skins, and that he acquiesced in this and that defendant thereupon sold them at the same price. That issue of fact has also been resolved in favor of the plaintiff by the jury. Further evidence was given on the part of the plaintiff tending to show that its president called on the defendant the next day and demanded the skins and was informed that he could not have them unless he paid one dollar and ten cents per skin therefor, but on the part of the defendant the testimony is to the effect that when Baer called that day he was informed that the skins had been sold.

The plaintiff has recovered on the theory that the market price of the skins at the time and place of delivery was one dollar per skin and the verdict is for the difference between the contract price and that market price. On the issue with respect to the market price it developed by the testimony of both parties that there are different qualities or grades of skins and that the market price thereof differed. On the part of the plaintiff the testimony shows that the market price of muskrat skins at the time in question varied from seventy-five cents to one dollar and seventy-five cents per skin depending on the quality or grade of the skins; and on the part of the defendant the evidence shows that the market price varied from forty cents to ninety-two cents and that the average price was from sixty cents to sixty-five cents. It is to be inferred from the evidence that the muskrat skins

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dealt in in this market come from some twenty northern and southern States and the evidence shows that the skins from the northern States are of a better grade or quality than those from the southern States.

There is no evidence with respect to the quantities in which the skins are purchased or the proportionate amount of skins from one section of the country or the other that come into the market, or with respect to whether the skins are sorted or graded before they are dyed or sold, and there is no evidence with respect to a custom concerning any of these matters. The contract being indefinite with respect to the grade or quality of skins, in the absence of any evidence with respect to the manner in which the skins are dealt in or with respect to any custom, it would seem that the contract could have been satisfied by the delivery of skins of any grade or quality, and inasmuch, therefore, as the plaintiff has recovered a verdict on the basis of a market price considerably higher than the minimum market price, depending on the grade or quality of the skins, shown by the preponderance of the evidence, it should not be permitted to stand. It is quite evident that considerable of the testimony was not directed to the market price of skins that would fulfill the terms of the contract. On the part of the plaintiff some of the testimony with respect to the market price was evidently based on the sample pursuant to which the plaintiff claimed the skins were sold; and on the part of the defendant some of the testimony was evidently based on the particular lot of skins which came in from the dyers at that time and were sold for the same amount that plaintiff agreed to pay. The plaintiff, in view of the Statute of Frauds, must stand on the contract as written which calls for no particular grade or quality of skins. It could, for aught that appears in this record, have been fulfilled by delivery of skins from the southern States which are less valuable than those from the northern States. Doubtless the contract was made with reference to the general average run of skins in this market and if it appeared that that is the manner in which skins are dealt in, the evidence should have been directed to the market value of such skins, and if on the other hand the skins are sorted or graded before they are dealt in then this contract could have been fulfilled by a

delivery of skins of the poorest grade or quality according to the manner in which they are customarily so sorted and graded.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SCOTT, PAGE and SHEARN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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ARTHUR SELWYN-BROWN, Respondent, v. SUPERNO COMPANY, INC., Appellant.

First Department, February 1, 1918.

**Corporations — suit to compel issuance of certificates of stock — evidence of ownership — parties defendant — appeal — matters not shown by record — issuance of certificates in excess of capital.**

In a suit to compel a corporation to issue to the plaintiff a certificate for a certain number of shares of its capital stock, evidence held sufficient to establish that the plaintiff was the owner and entitled to the certificate. It is well settled that a suit in equity by a stockholder will lie against a corporation to compel it to transfer its stock on the books of the corporation or to issue to him a certificate of stock, where it has wrongfully canceled his certificate.

As the plaintiff was able to prove his ownership and required no relief from one claimed by the defendant to be the owner of said stock, it was not necessary for the plaintiff to make such person a party defendant.

A judgment in favor of the plaintiff should not be permitted to stand where it appears that the defendant would be required to issue to him more than the entire amount of its present capital stock, it appearing from the evidence that its capital has been reduced.

As the record is barren with respect to the circumstances under which the capital was decreased or increased, there can be no adjudication concerning the validity thereof.

A corporation should neither be required to issue certificates in excess of its capital as authorized by law, nor should it be required to duplicate shares lawfully represented by outstanding certificates.

APPEAL by the defendant, Superno Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff,

entered in the office of the clerk of the county of New York on the 15th day of June, 1917, upon the decision of the court after a trial at the New York Special Term.

*Arthur L. Fullman* of counsel [*John G. Pheil* with him on the brief], for the appellant.

*Christian S. Lorentzen*, for the respondent.

LAUGHLIN, J.:

This is a suit in equity to compel the defendant to issue to the plaintiff a certificate for 5,100 shares of its capital stock, and enjoining it and its officers from denying to him the right to vote the stock and the proportionate voice in the conduct of the affairs of the company to which such ownership entitles him. It was brought upon the theory that upon the incorporation of the company on or about the 4th day of June, 1914, one Geoghegan, to whom 20,400 shares of capital stock were duly issued, surrendered his certificate therefor and authorized the defendant to issue three certificates in place thereof, one to plaintiff for 5,100 shares pursuant to a prior promoters' agreement between him and the plaintiff and one Matthews, and that certificates were thereupon issued accordingly, and proper entries of the transfer of the certificate from Geoghegan to plaintiff were entered in the books of the defendant, but that the certificate was not delivered to plaintiff and delivery thereof was refused on demand duly made and he has been excluded from exercising his rights as a stockholder.

The original name of the corporation was Lintross & Wylford Engineering Company, Inc., but the name was duly changed by an order of the Supreme Court made on the 12th day of May, 1915, to Superno Company, Inc., the defendant.

The evidence satisfactorily showed and the trial court found that the original certificate for 20,400 shares of the par value of five dollars each was duly issued to Geoghegan for full value and that, pursuant to an agreement in writing and under seal, made between Geoghegan, the plaintiff and Matthews on the 26th day of May, 1914, in contemplation of the formation of the company, the defendant Geoghegan in consideration of one dollar and other good and valuable con-

sideration, receipt of which was admitted, sold, assigned, transferred and set over unto the plaintiff with full power to transfer the same on the books of the corporation when opened all his right, title and interest in and to 5,100 shares of the capital stock of the company; that when the original certificate was issued to Geoghegan he surrendered it to the company for cancellation, without, however, formally transferring by signing the blank transfer and power of attorney printed thereon, and authorized and directed the officers of the company to issue three certificates in place thereof, one to himself for half the amount, another to plaintiff for one-fourth of the amount, or 5,100 shares, and the third to Matthews for a like amount, pursuant to said agreement of May 26, 1914, which he then produced and delivered to and left with the officers of the company, and that thereupon the original certificate to Geoghegan was canceled and certificates in place thereof were signed by the plaintiff as president of the company pursuant to the authority then verbally conferred by Geoghegan and pursuant to said agreement of May 26, 1914, and left with the treasurer of the company to be signed by him and to be held in escrow by him as treasurer and trustee pursuant to an agreement in writing then and there signed and executed between Geoghegan, the plaintiff and Matthews by which it was to be so held until they agreed that sufficient shares of treasury stock had been sold to enable the company satisfactorily to finance its business, such period, however, not to exceed two years, and by which the respective owners of the stock were to be entitled to vote thereon in the meantime; that these certificates were subsequently signed by the treasurer and held by him pursuant to the escrow agreement; that the plaintiff was not permitted to exercise his right to vote his certificate of stock and that delivery of it to him after the expiration of the escrow agreement was refused and that without his consent or authority from him, but by direction of Geoghegan, it was indorsed by the president and secretary and treasurer of the company as canceled on the 22d day of July, 1915; that the stock and minute books of the defendant showed that the certificate was so issued to the plaintiff and that he held and owned the same on the 4th day of June, 1915, which is the date filled in in the certificate signed in

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blank by the plaintiff as president on or about the 4th day of June, 1914, as aforesaid.

The judgment in favor of the plaintiff to the effect that he was the owner and entitled to the certificate of stock is fairly sustained by the evidence. The contention of the appellant that his sole remedy is an action at law is without merit. It is well settled that a suit in equity by a stockholder will lie against a corporation to compel it to transfer his stock on the books of the corporation or to issue to him a certificate of stock where it has wrongfully canceled his certificate. (*Bedford v. American Aluminum Co.*, 51 App. Div. 537; *Powers v. Universal Film Mfg. Co.*, 162 id. 806; *Travis v. Knox Terpezzone Co.*, 165 id. 156; *affd.*, 215 N. Y. 260; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 id. 365; *Robinson v. Nat. Bank of New Berne*, 95 id. 637.)

The defendant pleaded as a defense that Geoghegan was the owner of the stock claimed by the plaintiff and that he forbade the transfer of the stock to the plaintiff and demanded that it be delivered to him. It was neither alleged nor proved that stock representing plaintiff's certificate had been issued to a *bona fide* holder for value or to any one, or that issuance of the certificate to plaintiff would constitute an unlawful duplication of stock. (See *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 81.) The plaintiff was able to prove his ownership of the stock and required no relief from Geoghegan with respect thereto and, therefore, it was unnecessary for him to make Geoghegan a party defendant; but if defendant deemed it necessary for its protection against any claim by Geoghegan to have him bound by the judgment it could have interpleaded him. (*Powers v. Universal Film Mfg. Co.*, *supra.*)

The defendant further pleaded as a separate and partial defense that on or about the 6th day of April, 1915, its capital stock was reduced from 40,000 shares of the par value of five dollars to 5,000 shares of the par value of five dollars and it offered evidence in support of that defense which was excluded and it excepted to the ruling. Evidence, however, to the effect that the capital stock was so reduced came into the record incidentally and the court found at the request of the defendant that the capital stock had been so reduced.

There is also an intimation in the record that the capital was subsequently increased. The record being barren with respect to the circumstances under which the capital was decreased or increased there can be no adjudication concerning the validity of such decrease or increase of the capital stock. If the judgment were permitted to stand the defendant would be required to issue to the plaintiff more than the entire amount of its present capital stock provided its capital has been lawfully reduced to 5,000 shares. It would, therefore, in any event be necessary to limit the judgment on this record to the plaintiff's rights as of June 4, 1914. That, however, would only result in confusion and would necessarily lead to further litigation to have it determined what his ownership of 5,100 shares of stock as of June 4, 1914, represents at the present time. It does not appear whether or not a certificate of stock was issued in place of the plaintiff's certificate when or before or since it was canceled nor does it appear whether when the capital was reduced or increased a certificate representing the plaintiff's stock or his interest in the increased stock was issued to another. The corporation should neither be required to issue certificates in excess of its capital as authorized by law nor should it be required to duplicate shares lawfully represented by outstanding certificates; and it may, therefore, be essential to a complete determination of the issues to bring in other parties to the end that the judgment to be entered shall finally authoritatively adjudicate these matters and shall not require the unlawful duplication of stock or the issuance of stock in excess of the authorized capital. (*New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 79, 80, 81; 17 id. 592; *Mechanic's Bank v. N. Y. & N. H. R. R. Co.*, 13 id. 599; *Kellogg v. Siple*, 11 App. Div. 465; *Reno Oil Co. v. Culver*, 33 Misc. Rep. 718; *Thomp. Corp.* [2d ed.] §§ 3545, 3550, 3551, 3552, 3558.)

It follows that the judgment should be reversed and a new trial granted, but without costs.

CLARKE, P. J., PAGE and SHEARN, JJ., concurred; SCOTT, J., concurred in result.

Judgment reversed and new trial ordered, without costs. Order to be settled on notice.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, Appellant, v. FANNIE M. THOMSON, as Executrix, etc., of HENRY M. THOMSON, Deceased, Respondent.

First Department, February 1, 1918.

**Evidence — action to recover premiums on policies of liability insurance — defense — evidence as to parol agreement of plaintiff to furnish insurance without expense inconsistent with subsequent contract between parties and in conflict with provisions of policies — trial — objections.**

In an action to recover premiums on three policies of liability insurance issued by the plaintiff, *held*, that the verdict of the jury upon the issue, supported by parol evidence, as to whether or not the plaintiff agreed to furnish the insurance without expense to the insured was against the weight of the evidence and in direct conflict with the subsequent action of the insured in paying premiums on the policies.

Said alleged parol agreement was inconsistent with a subsequent written contract between the parties, which was intended to embrace all of the obligations of the plaintiff to the insured, incident to the latter taking the assignment of a construction contract which it is claimed on the part of the defendant constituted the consideration for the parol agreement with respect to the liability insurance; and so, a parol collateral agreement resting for its consideration on the written agreement could not be supported thereby.

Moreover, the parol evidence was in conflict with the express provisions of the policies which the insured received and retained, and although that precise objection was not taken to the evidence, it existed and could not have been overcome.

APPEAL by the plaintiff, Massachusetts Bonding and Insurance Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 18th day of October, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying plaintiff's motion for a new trial made upon the minutes.

*John R. Halsey* of counsel [*Halsey, Kiernan & O'Keeffe*, attorneys], for the appellant.

*Charles H. Street*, for the respondent.



LAUGHLIN, J.:

This is an action to recover premiums on three policies issued by the plaintiff to the decedent Thomson who died after the trial and pending the appeal.

On the 27th day of May, 1912, the Hicks-Johnson Construction Company entered into a contract with the city of New York for the construction of a sewer in Central avenue in the borough of Queens. The contract contained no provision requiring the contractor to carry liability insurance. The contractor gave a bond to the city in the penalty of \$50,000 for the faithful performance of the contract, and the plaintiff and the United States Fidelity and Guaranty Company were sureties on the bond. The contract was assigned to the Arch Engineering Company, Inc., on the 19th day of September, 1912, and plaintiff and the city consented thereto. On the 12th day of November, 1913, the contract was assigned to Thomson with the consent of the plaintiff and with the approval of the city. On the same day a contract in writing was made between Thomson and the two surety companies reciting the making of the original contract for the construction of the sewer, that the surety companies became sureties on the bond of the contractor, the first assignment of the contract, and that Thomson was about to take an assignment thereof and desired the consent of the sureties; and Thomson agreed to complete the contract work to the satisfaction of the city for the money remaining unpaid on the contract and to satisfy all liens and assignments against the contract, and that he would indemnify and save the surety companies harmless from liability as sureties on the original contract; and the surety companies agreed that in the event that the cost of completion should exceed the amount unpaid by the city on the contract they would pay to him the excess not exceeding \$5,000, but it was expressly provided that they should in no event be obligated to Thomson for more than \$5,000. Two of the policies on which the action is brought were transmitted to Thomson by an insurance broker on the 9th day of December, 1913, with a letter stating that they were dated on the thirtieth of September that year in order to avoid taking an assignment of existing policies issued by plaintiff to the first assignee running until December thirty-

first that year and, in effect, to obtain a more favorable rate for him, and he requested that the deposit premiums be promptly paid. One of these two policies was for insurance against liability to employees and the other for insurance against liability to third persons, and by the terms of the policies a deposit premium of \$40 was required on one and of \$10 on the other. These deposit premiums were paid by Thomson the latter part of December, 1913, after the delivery of the policies to him. The third policy was issued on the 30th of June, 1914, under the Workmen's Compensation Law.

Over the objections and exceptions duly taken by the plaintiff the court received parol evidence offered by the defendant, in support of a defense pleaded, with respect to a parol agreement claimed to have been made between Thomson and the plaintiff long prior to the said agreement of November 12, 1913, between him and the plaintiff and the other surety company. The objections to this evidence were that it was immaterial and incompetent and constituted an attempt to vary the terms of said agreement of November twelfth. Objection was not specifically taken that it was an attempt to vary the terms of the policies. The court, however, received the evidence subject to a motion to strike it out. A motion was subsequently made to strike out the evidence thus received on the ground that it tended to vary the terms of a written instrument. The court denied the motion on the ground that the contract of November twelfth constituted a limitation of liability of the *two* surety companies to \$5,000 and since it did not limit the liability of the plaintiff *alone* to that amount it would not preclude the admission of parol evidence with respect to the agreement for the three policies. The parol evidence received in behalf of the defendant tended to show that while Thomson was negotiating for the assignment of the sewer contract the assistant manager of the plaintiff stated to him that if he took the assignment the plaintiff would expect to carry the liability insurance, and that he replied that he would expect the plaintiff to do so without expense, whereupon plaintiff's assistant manager replied that it would not do that; but that shortly thereafter and before he took the assignment plaintiff's manager agreed that it would furnish the liability insurance without expense

unless there should be sufficient money in the fund over and above the cost of completing the sewer to pay the premiums. There was no surplus to entitle plaintiff to recover on that theory. That testimony was controverted by plaintiff's manager and assistant manager and the issue arising thereon was submitted to the jury. We are of opinion that the verdict of the jury upon that issue is against the weight of the evidence. It is in direct conflict with the subsequent action of Thomson in paying the first premiums on the policies and it is probable that if there had been such an agreement it would have been referred to in the agreement of November twelfth or have been otherwise reduced to writing. It is further improbable in that plaintiff would thereby have incurred liability which might have far exceeded its original liability as a surety on the bond of the original contractor. Thomson testified that he asked to have the parol agreement reduced to writing but that his request was refused on the ground that the agreement might be illegal. If that had been the view of the officers of the plaintiff it would also tend to show the improbability of the making of the agreement; but Thomson's testimony on that subject was also controverted. This alleged parol agreement was certainly in one view inconsistent with the contract of November twelfth, which it is evident was intended to embrace all of the obligations of the plaintiff to Thomson incident to his taking the assignment of the contract for the sewer which it is claimed on the part of the respondent constituted the consideration for the parol agreement with respect to the liability insurance; and if so a parol collateral agreement resting for its consideration on the written agreement could not be supported thereby. (*Eighmie v. Taylor*, 98 N. Y. 288; *Studwell v. Bush Co., Ltd.*, 126 App. Div. 818.) Moreover, the parol evidence was in conflict with the express provisions of the policies which Thomson received and retained and although that precise objection was not taken to the evidence it existed and could not have been overcome. (*Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 161; *Pindar v. Resolute Fire Ins. Co.*, 47 id. 114, 117; *Walton v. Agricultural Ins. Co.*, 116 id. 317, 322; *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239, 242; *Home Ins. Co. v. Continental Ins. Co.*, 89 App. Div. 1; *affd.*, 180 N. Y. 389.)

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It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SCOTT, PAGE and SHEARN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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DANIEL P. RITCHEY, Appellant, v. JENNY STAFFORD MURPHEY,  
Respondent.

First Department, February 1, 1918.

**Appeal — right of plaintiff where complaint dismissed at close of his case — principal and agent — action by real estate broker for commissions — effect of inability of vendor to execute valid conveyance.**

A plaintiff whose complaint has been dismissed at the close of his case is entitled upon appeal to the most favorable inferences to be drawn from the evidence.

A real estate broker, employed to procure a purchaser ready, willing and able to take an assignment of a lease and to purchase furniture and stock upon the terms and conditions imposed by the vendor, who finds such a purchaser, is entitled to his commissions, although the contract falls through because the vendor had no authority from her lessor to make an assignment. The broker's right to compensation was not dependent upon an agreement with a purchaser being actually made, nor upon the ability of his employer to comply with the terms and conditions which she herself fixed.

APPEAL by the plaintiff, Daniel P. Ritchey, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of May, 1917, upon a dismissal of the complaint by direction of the court at the close of plaintiff's case.

Noah A. Stancliffe of counsel [*Charles J. Hardy* with him on the brief; *Hardy, Stancliffe & Whitaker*, attorneys], for the appellant.

Francis E. Neagle of counsel [*Stephen Barker* with him on the brief; *Rounds, Hatch, Dillingham & Debevoise*, attorneys], for the respondent.

SCOTT, J.:

The plaintiff is a real estate broker. The defendant, in the year 1916, was the lessee of an hotel in the city of New York, and the owner of the furniture therein and of a stock of supplies. Being desirous of retiring from business she employed the plaintiff to procure some one who would take an assignment of her lease (which had three and one-half years to run), and would purchase her furniture and stock. The plaintiff succeeded in finding such a purchaser in the person of one Wilbraham and after the usual dickering, defendant and Wilbraham came to an agreement which was put in writing and signed by both parties on November 24, 1916, and an earnest of \$2,000 paid by Wilbraham on account of the purchase price. This agreement fixed the price to be paid, the method of payment and the date on which the sale was to be consummated and the transfer made. This agreement, however, was made dependent upon two conditions to be performed by defendant, to wit, that there should be obtained from the landlord (1) a written consent allowing the assignment of the lease, and (2) a written option to the purchaser, his assignee or appointee for a renewal of the lease. It is conceded that neither this consent nor option was ever obtained, and hence it is argued that the minds of the parties never met, and that plaintiff had not earned his commission because he had not procured a purchaser ready, able and willing to buy upon terms acceptable to and accepted by the defendant; in short, that the agreement was a mere option.

The complaint was dismissed at the close of the plaintiff's case, and he, therefore, is entitled, upon this appeal, to the most favorable inferences to be drawn from such evidence as he adduced.

As to the option for a renewal Mr. Wilbraham testified, and so the complaint alleges, that when he found that it could not be obtained, he waived that condition and expressed his willingness to complete the transaction if only the landlord's consent to the assignment could be procured, and the lack of this consent was, as it appears, the only obstacle standing in the way of a final and complete agreement.

The plaintiff's employment as broker was to procure a purchaser ready, willing and able to make a purchase upon

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the terms and conditions imposed by the vendor. His right to compensation was not dependent upon an agreement with a purchaser being actually made, nor upon the ability of his employer to comply with the terms and conditions which she herself fixed. (*Baumann v. Nevins*, 52 App. Div. 290; *Smith v. Peyrot*, 201 N. Y. 210; *Schweid v. Storandt*, 157 App. Div. 855; *affd.*, 217 N. Y. 637.)

One of the conditions of sale stated by defendant to plaintiff, and repeatedly reiterated during the negotiations was (as indicated by the testimony) that she had full right and authority to assign her leasehold, and would require no further consent from the landlord. She seems to have displayed a curious unwillingness to exhibit her lease (which was not recorded), but according to the evidence she continually asserted her right and power to make a valid assignment. It was only because, as the event proved, she had no such right and could not obtain it, that the sale fell through.

The defendant's position, therefore, upon the record now before us is no different from that of a person who, representing that he holds title to real estate, employs a broker to procure a purchaser. If the broker finds one who is ready, able and willing to purchase on the vendor's terms, and the sale falls through solely because the employer has no title, and, therefore, cannot make a valid conveyance, the broker is nevertheless entitled to recover his commissions.

Upon the evidence as it stood the plaintiff had made a *prima facie* case for submission to the jury and it was error to dismiss his complaint.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

**FRANK M. KNAPP, Appellant, v. UNITED STATES TRANSPORTATION COMPANY, Respondent.**

Fourth Department, January 9, 1918.

**Ships and shipping — negligence — liability of owner of ship for injury to second mate caused by end of cable breaking away from fastening to winch — expert testimony — evidence insufficient to establish negligence — assumption of risk — maritime law applied — Federal statute making master of ship alter ego of owner not retroactive.**

In an action by a second mate employed by the defendant, a foreign corporation, which owned and operated a merchant ship, to recover damages for personal injuries caused by the end of a cable which broke away from its fastening to a winch on the ship by reason of the alleged negligent use of a defective appliance to secure such fastening, or failure to inspect such appliance, it appeared that the plaintiff was familiar with the manner in which the cable should be fastened; that expert testimony as to the method of fastening the cable was received, but there was no evidence that the clamp used by the defendant was insufficient in its mechanism or strength or as to the reason for its giving way.

*Held*, on all the evidence, that the negligence of the defendant was not established;

That the plaintiff knew how the cable was fastened and assumed the risk of its insufficiency, if such insufficiency existed.

An action of this kind must be determined under the substantive maritime law which may be enforced in an action in a State court where the procedure is such as to warrant the same.

A vessel and her owner are liable to an indemnity for injuries received by seamen in consequence of failure to supply and keep in order the proper appliances appurtenant to the ship.

The act of Congress, passed on the 4th of March, 1915, by which it is sought to make the master of a ship the *alter ego* of the owner, is not retroactive.

**APPEAL** by the plaintiff, Frank M. Knapp, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 27th day of October, 1916, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case, and also from an order entered in said clerk's office on the same day denying plaintiff's motion for a new trial made upon the minutes.

*Elijah W. Holt*, for the appellant.

*Fred W. Ely* and *T. H. Gary*, for the respondent.

DE ANGELIS, J.:

The action was to recover damages for personal injuries sustained by the plaintiff as an employee of the defendant, caused by the end of a cable which broke away from its fastening to a winch by reason of the alleged negligent use of a defective appliance to secure such fastening or failure to inspect such appliance.

The defendant is a corporation of the State of Maine and owned and operated on the Great Lakes a large merchant ship known as the *B. Lyman Smith*.

On the 17th day of August, 1909, the *B. Lyman Smith* lay port side against pier No. 2 at the dock in the harbor of Lake Superior at Duluth, in the State of Minnesota. She was laden with iron ore and ready to leave the harbor.

The pier was at right angles to the shore. The ship's bow was towards the shore and her stern towards the center of the harbor.

This steamship was 380 feet long and 50 feet beam. The cable was a steel cable 275 feet long, seven-eighths of an inch in diameter and made of a center of hemp rope surrounded by six strands of steel wire. There were nineteen wires in each strand. The winch was one of two winches, side by side, called a double winch, located in the after part of the ship. We are concerned with only one of these winches. A winch resembles the ordinary spool on which thread is wound, the ends being called flanges and the part between the ends the drum. The diameter of the drum of the winch in question was fifteen inches and its length was fifteen inches. The motive power of the winch was a small steam engine. The cable was attached to the winch in this manner. The end of the cable was put through a hole in the flange of the winch from the inside near the point where the cable would begin to wind around the drum and such end of the cable was then held by a clamp on the outside of the flange. This clamp was composed of four pieces to wit: (1) The principal piece, being a piece of iron in form like the letter U with screw



threads on the two ends, (2) a straight bar of iron with holes for the reception of the two ends, and (3, 4) two nuts, one for each end. The bar of iron was adjusted to the two ends of the main piece. The end of the cable was placed between the bar and the main piece. The nuts were then adjusted to the ends and screwed down against the bar until the end of the cable was held between the bar and the main piece.

The steamship was so long that it was necessary to warp her stern around pier No. 2 to allow her bow to swing around so as to head for the lake. To accomplish this she steamed slowly backward while her stern was kept close to the pier by means of the cable and the winch. One end of the cable was attached to a pile on the far side of the pier and the other end to the winch. The captain was on the bridge and the plaintiff, the second mate, was operating the winch and was standing on the starboard side of the winch and near thereto. The captain was in command and the means of communication between him and the plaintiff were convenient and adequate. When there remained two layers of the cable upon the drum of the winch, the plaintiff called to the captain through a megaphone, "Stop her, Captain. Go ahead on her. The line is getting down short." The captain looked at him but otherwise seemed to pay no attention to what he said. The steamer was moving about as fast as a man would walk. Within a minute of the first call the plaintiff called again to the captain through the megaphone, "Captain, stop her; and go ahead on her. The line is pretty near all off the drum." There were then ten turns of the cable on the drum, that is, there was about a half a layer of the cable on the drum. Just then the winch end of the cable gave away and whipped around in such a manner as to cut off the thumb of the plaintiff's left hand and the two fingers next thereto. At the time of the accident the plaintiff stood at the winch, his left hand holding the lever which controlled the application of the power of the winch engine to operate the winch.

The plaintiff had shipped on this steamer on the second day of July, as second mate, and was leaving the harbor at Duluth upon his third trip, and during all this time he had used this winch and cable and had experienced no difficulty in connection therewith. He was thoroughly familiar with

the winch and its operation and the cable and its operation. He had the cable out pretty nearly the length of it on some occasions before the accident. He was so familiar with the manner in which the cable should be fastened to the winch that he did not hesitate to express an opinion upon the subject as an expert, in which opinion he found fault with the manner in which the cable was fastened in this case, although he was entirely familiar with the manner in which the cable was so fastened.

What became of the *clamp* is a mystery. No witness testifies to seeing it at the time of the accident or afterwards. If it slipped off the end of the cable either because the nuts on the bolts got loose, as is suggested but not proven, or because the end of the cable had worn with use or shrunk as is suggested but not proven, or if it broke as is suggested but not proven, it must have fallen and lodged in plain sight on the deck. The witness Arnold stated that he looked for the clamp, but the extent of his quest is not shown. The plaintiff discloses nothing on the subject.

Arnold, testifying naturally and not from suggestion in reference to the winch end of the cable, stated that "there were about six inches of this cable on the end that were unraveled." This end is referred to in other parts of the evidence as "frayed." There is no evidence, however, that points to anything indicating that it was worn or that it was shrunken or even drawn through the clamp. If it was "unraveled" or "frayed" for six inches that condition might have been the result of the "whipping" that is said to have taken place when the plaintiff's hand was injured.

It will be remembered that the diameter of the drum was fifteen inches and that of the cable seven-eighths of an inch. The experts called by the plaintiff testified that the diameter of the drum should be thirty times greater than that of the cable. These experts further testified that the smaller cable is more flexible and can bend around and hug the drum more than the larger cable; that the smaller cable lessens the burden upon the fastening that attaches the cable to the drum of the winch. Experts further testified that the fastening of the cable to the drum should be of such strength that if the cable was entirely unwound from the drum in the use of the

winch and a test came of the relative strength of the fastening and of the cable, the cable should break before the fastening.

In order that the precise effect of the testimony given by the experts in favor of the plaintiff may be clearly shown, we shall quote some of their testimony: Mr. Williams was asked these questions and made these answers: "Q. What would you say was the approved and customary method in good engineering practice of fastening that kind of a cable, of that size [seven-eighths of an inch in diameter] to a winch of the kind shown on these exhibits, with a drum fifteen inches in diameter, in order that it might stand the normal pull or strain of such a winch? A. I would take a few strains around some interior portion, through that hole, then bring it back on itself, then use the clamp, thereby putting the strain on that portion around which the rope was wound rather than upon the clamp itself. Q. Use the clamp how, over one thickness of cable or two? A. Use the clamp around two thickness of cable, after the cable had been brought back on itself after having been wound around some portion of the machinery presumably the inside hub of that flange of the drum. That is generally accessible and clear so that the rope can be wound around it. \* \* \* Q. Assuming that a winch of the kind shown in these photographs, with a fifteen inch diameter drum, is using a seven-eighths cable; the maximum pressure or normal load, if you call it such, which it is intended to stand, being the power of its engine, what would you say was the proper, safe, and approved method of good engineering tactics of applying that cable so as to fasten it securely to the drum? \* \* \* A. The same method I described before exactly, by winding it around the hub of the drum, bringing it back on itself and clamping it to the other portion of the cable which throws probably ninety-five per cent of the strain on the turn around the drum and relieves the stress from the clamp.'

The witness Dollar, describing the method that might be adopted securely to fasten a cable to a winch like the one in question, stated: "One method is wrapping the bight of the cable around the hub of the winch and bringing it around a couple of spokes and bringing it back on itself and fastening it with a double clamp. Another method is to bend the

cable and catching the two parts of it in a double clamp and allowing them to draw up against the side of the flange."

The witness Farrell gives these methods: "A. There are three or four different methods; one is to twist it around the hub and then fasten it. There is another where you pass it through a hole and back and then fasten it by a double clamp, and then put it in a bight and put the clamp over the two of them, then put on the clamp and fasten your clamps down tight."

The witness Williams, testifying in reference to the winch, cable and method of fastening in question, was asked the following question and gave the following answer: "Q. What would you say, Mr. Williams, as to whether or not there is any tendency, with a clamp of this sort shown you, upon a winch of this sort shown in these exhibits, from the operation of the winch for the clamp to become loosened? A. Well, there are two ways in which it might be done under these conditions, one would be the natural jar of the machine might loosen the nuts on the clamp, and then again the excessive pounding on the rope might tend to reduce the rope sufficiently to loosen the rope in the clamp itself without loosening the nuts in the clamp. Those two methods might be possible, with the ultimate result the rope would not continue to clamp."

Speaking on the same subject the witness Dollar testified as follows; "A. The pull on the cable passing through the hole in the web, and being bent at almost right angles starts a working, you might say, of the fibres of the cable, the wires of the cable, which has a tendency to loosen the hold of the clamp on the cable and gradually work it off in a spiral direction, conforming to the lay of the cable."

This tendency of the nuts to loosen can be reduced or prevented according to the testimony of the experts by the use of copper bands or lock nuts in connection with the nuts that were used.

The witness Williams, after declaring that the method of fastening the cable to the winch shown in this case was insufficient, was asked the following question and gave the following answer: "Q. Assuming, Mr. Williams, that a winch exactly like the one shown on these photographs, with

a fifteen inch diameter drum, using a seven-eighths cable, was being operated with about half of the throttle open, no application being made of the friction clutch, and when there were ten turns of the cable around the drum, the clamp which was of the same design, pattern and size as the one which I exhibited to you, pulled off or the cable pulled through it, so as to release the cable from the drum, what would you say was the cause, or can you tell the cause of its pulling off? A. The insufficiency of the clamp, or the arrangement by which it was attached to the rope."

The witness goes so far as to state that no system of inspection would prevent the pulling off of the cable under the assumed circumstances, although it might have a tendency in that direction.

The witness Dollar was asked these questions and made these answers: "Q. Assuming that a device like this shown on the pictures, on board the ship *B. Lyman Smith* with a [fifteen] inch diameter drum, and seven-eighths diameter cable, such as you see here exhibited, fastened with a clamp, such as you see here exhibited, while it was being operated with half or approximately half of the power of the steam applied to it [with ten turns of the cable remaining on the drum], pulled loose from the fastening so that it whipped around the drum, can you state what was the cause of its pulling loose under those circumstances? \* \* \* A. The clamp either broke or came off of the cable. Q. Assuming that the clamp didn't break, then what happened? A. It came off over the end."

We assume that the last question and answer were a humorism.

Assuming for the sake of the argument that experts may go as far as they were permitted to go by the trial court, still a comparison of their testimony shows that they all agreed that the appliance used for fastening the cable to the winch should be at least as strong as the cable and that the appliance should hold with equal strength when the cable is all payed out and all that holds the cable to the drum of the winch is the appliance. No fault is found with the mechanism or strength of the clamp. It is suggested that the nuts might have become loosened or the cable worn or shrunken where it had been gripped by the clamp, so as to have liberated the

cable from the grip of the clamp. But there is no evidence of any such condition.

It will be observed that in their attempt to assign causes for the accident Williams attributes it to "the insufficiency of the clamp, or the arrangement by which it was attached to the rope," and Dollar says "the clamp either broke or came off of the cable."

There is no evidence that the clamp was insufficient in its mechanism or strength as already stated. There is no evidence that the nuts were loose or that the end of the cable was in such condition as to slip from the grip of the clamp. There is no evidence that the clamp either broke or did not break, although it is clear that it might have broken without fault on the part of the defendant.

So that assuming that this court was right in holding on the first appeal that the happening of the accident did not create a presumption of negligence on the part of the defendant (151 App. Div. 900), the evidence as it now stands fails to show that the defendant was negligent. The evidence goes to this, and nothing beyond, that the defendant might have been negligent.

According to all the experts, in the last analysis, the test of the fastening is that it should hold when the cable is all payed out until the cable breaks. This must be so irrespective of the size, that is, the diameter of the cable. The plaintiff knew how this cable was fastened and he assumed the risk of its insufficiency, if such insufficiency existed.

It is well settled that an action of this kind must stand or fall upon the substantive maritime law. That law may be enforced in an action in a State court where the procedure is such as to warrant the same. (*Bach v. Western Transit Co.*, 165 App. Div. 950; *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Schuede v. Zenith S. S. Co.*, 216 Fed. Rep. 566; *affd.*, 244 U. S. 646.)

The law governing the subject was comprehensively stated in the well-known case of *The Osceola* (189 U. S. 158, 175), where the court said: "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

" 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

" 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (*Scarff v. Metcalf*, 107 N. Y. 211.)

" 3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

" 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The plaintiff sought to bring himself within the second rule laid down, but has failed.

In this connection we must not forget that the word "master" is used in the foregoing in its *nautical* sense and not as ordinarily used in treating the relation between master and servant. An act was passed by Congress on the 4th of March, 1915 (38 U. S. Stat. at Large, 1185, chap. 153, § 20), by which it is sought to make the master of a ship the *alter ego* of the owner, but that has no application here as the plaintiff received his injuries in 1909 and that act has been held not to be retroactive. (*Matter of Tonawanda Iron & Steel Co.*, 234 Fed. Rep. 198; *The San Juan*, 241 id. 288.)

It follows from the foregoing that the judgment and order appealed from must be affirmed.

All concurred.

Judgment and order affirmed, with costs.

**EDWARD LUMLEY and ROSE L. LUMLEY, Appellants, v. VILLAGE OF HAMBURG, Respondent.**

Fourth Department, January 9, 1918.

**Waters and watercourses — suit to enjoin village from polluting water, running in open ditches through plaintiff's land, by introduction of sewage therein, and from causing said ditches to overflow — open ditches may constitute watercourses to which rights of riparian owners attach — right to discharge surface water — pollution of fresh water streams.**

In a suit to enjoin a village from polluting water running in open ditches through the plaintiffs' farm by the introduction of sewage therein and from collecting from its paved streets through its sewer system water and sewage in such quantities as to overflow the plaintiffs' land under cultivation, and to recover damages, it appeared that part of the plaintiffs' farm consisted of low land, which had been wet and swampy, and was drained by open ditches which had existed as such for many years, and that the defendant's sewer system opened into these ditches.

*Held*, on all the evidence, that the main ditch through plaintiffs' land overflowed its banks and injured the plaintiffs' crops owing to the fact that the defendant, through its sewer system, overtaxed the capacity of the ditch;

That the defendant permits sewage to pollute the waters passing through the plaintiffs' lands, which should not be permitted to continue;

That a judgment dismissing the complaint on the merits should be reversed and a new trial granted.

Open ditches constructed to drain low lands and used for many years for such purpose become watercourses, and the owners of the land through which they run are entitled to the same benefits and are subject to the same burdens as attach to riparian owners on ordinary watercourses.

Such riparian owners are obligated to keep free and unobstructed the watercourses through their lands.

Surface waters may be collected and discharged in such a watercourse, but not in such quantities as to overflow the banks.

Fresh water streams may not be polluted. The right to pollute such streams may not be acquired by prescription or lapse of time.

**APPEAL** by the plaintiffs, Edward Lumley and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 17th day of January, 1917, dismissing the complaint on the merits upon the decision of the court after a trial at the Erie Special Term.



*Ernest F. Kruse*, for the appellants.

*Willard H. Ticknor* [*Fred J. Blackmon*, attorney], for the respondent.

DE ANGELIS, J.:

The plaintiffs brought this action to enjoin the defendant from polluting water running in a channel through the plaintiffs' farm by the introduction of sewage therein; to enjoin the defendant from collecting from its paved streets through its sewer system water and sewage and causing the same to flow in such channel to the plaintiffs' farm in such quantities as to exceed the capacity of the channel and through such means to cause such water and sewage to overflow the plaintiffs' farm land under cultivation and to destroy their crops, and to recover the damages sustained on account of such acts of the defendant.

The defendant denies that it has a sewer system; claims that it only turns surface storm water into such channel and that it has a right so to do; denies that it has introduced sewage into such channel or polluted the water therein; alleges that the owners of property in said village have a prescriptive right to discharge water by drains into such channel; alleges that some of its streets are State highways over which the defendant has no control; and alleges that there is a misjoinder of parties defendant in that the county of Erie is not made a party defendant.

The trial court decided that the defendant had not polluted the waters of the channel in question; that the defendant had not created a nuisance, and that water did not overflow the banks of the channel and did not damage the plaintiffs' crops.

We think these findings are against the weight of the evidence.

The plaintiffs own about twenty-four acres of land adapted to and used for gardening and farm purposes, situated in the town of Hamburg, Erie county, west of the village of Hamburg.

There is a tract of low land extending from the Amsdale road, called on the defendant's map (Exhibit A) the Foit road, easterly through the northerly part of the village of Hamburg to a point easterly thereof. This tract was wet and

swampy. For more than forty years before the trial of this action there had existed in this tract of land what is described as an open ditch extending from the Amsdale road easterly in a practically straight line for the distance of about a mile. We shall call this the main ditch. The water runs westerly therein in greater or less quantities, depending upon the season of the year and weather conditions. This ditch crosses the Amsdale road and the water running therein goes thence in a watercourse southwesterly about a mile to the Eighteen Mile creek, a tributary to Lake Erie.

At the easterly end of the main ditch it is joined by an open ditch known as the Fatty ditch which extends in a straight line northerly about 1,055 feet, and thence mainly southeasterly till it reaches the mouth of one of the village sewers referred to as the Pleasant avenue sewer, a distance of about 2,950 feet. This southeasterly course of the Fatty ditch is southerly and westerly of and not far from a ridge of land on which the Ridge road is located. An open ditch known as the Church or Fronheiser ditch from the northeast enters this part of the Fatty ditch about 1,400 feet from the mouth of the Pleasant avenue sewer.

Another open ditch known as the Foit ditch enters the Fatty ditch from the east, near the easterly end of the main ditch, and extends southeasterly to a point at the Erie railroad where it receives the drainage of one of the defendant's sewers.

The Fatty ditch and the Foit ditch are in the tract of low, wet, swampy land above referred to and the water running in them goes into the main ditch. Formerly the Fatty ditch extended northeasterly in such tract of land from the point of entrance of the Pleasant avenue sewer through the northerly part of the present site of the village to a point outside of the village limits but this part of the tract within the village limits has been drained and built upon. The Fatty ditch in its present state, the Foit ditch and the Church or Fronheiser ditch have existed for more than forty years as open ditches. They and the main ditch appear to have been artificial ditches in their origin. Experts were sworn on the trial to show that fact. They were doubtless dug to drain this low, wet, swampy tract of land. The tradition is

that they were dug as neighborhood drains by those who owned the land which they traversed.

By reason of the lapse of time and the manner of their use these ditches have become watercourses as fully as though they were not artificial in their origin. This proposition seems not to require authority to support it, but such authority may be found in *Freeman v. Weeks* (45 Mich. 335), a case in which Judge COOLEY wrote the opinion.

As these ditches are watercourses, the owners of the land through which they run are entitled to the same benefits and are subject to the same burdens as attach to riparian owners on ordinary watercourses.

It is well settled that such riparian owners are obligated to keep free and unobstructed the watercourses through their lands.

It is also well settled that surface water may be collected and discharged in such a watercourse, but the right so to discharge such surface water has the limitation that the same may not be discharged in such quantities as to overflow the banks of the watercourse.

It has become the settled law of this State that fresh water streams may not be polluted and that the right to pollute the same may not be acquired by prescription or any lapse of time.

The main ditch above described runs through the plaintiffs' land for the distance of 491 feet.

The defendant, the village of Hamburg, was incorporated in the year 1874, is a growing village, and at the time of the trial contained a population of about 2,800 people.

Within the last few years the village has caused many of its streets to be paved, from twenty-eight to thirty feet in width, with brick. Each of its paved streets is fitted with gutters, curbstones and manholes. The village has constructed vitrified pipe sewers in these paved streets into which the water accumulating upon the streets is conducted through the manholes. From a large number of these streets such water is conducted into what is known as the Pleasant avenue sewer which runs under the Erie railroad and into the Fatty ditch at the point above described. The water from others of these streets is conducted into other sewers,

some of which is discharged into the Foit ditch and some into the Church or Fronheiser ditch. While it is true that some of the water from some of the paved streets which would naturally have gone into these open ditches before these streets were paved and the sewers constructed is conducted in another direction, yet it seems certain that by reason of the capacity of the pavements to hold water, the rapidity with which water runs over them and the facility with which such water can reach the level of these ditches, the water that finds its way from the pavements into these open ditches must from time to time overtax their capacity. We think that the evidence establishes that in the fall of 1914 and in the fall of 1915 the main ditch was caused to overflow its banks and injure the plaintiffs' crops owing to the fact that the defendant, through its sewer system, overtaxed the capacity of the main ditch, notwithstanding the finding of the trial court to the contrary.

We think that the evidence establishes the fact that the defendant, the village, permits or suffers discharges from cesspools and water closets to enter its sewers and that such discharges pollute the waters of the main ditch passing through the plaintiffs' land. The extent of such pollution is not great at the present time but such pollution should not be permitted to continue.

We might make findings upon the evidence and direct the judgment that should be entered thereon, but in view of the importance of the litigation and because of the indefiniteness of the evidence in some important respects, we think a new trial should be had.

It follows that the judgment must be reversed and a new trial granted, with costs to the appellants to abide the event.

All concurred, KRUSE, P. J., not sitting.

Judgment reversed and a new trial granted, upon questions of law and fact, with costs to appellants to abide event, and findings disapproved in accordance with opinion.

In the Matter of the Application to Compel an Accounting  
in the Estate of LOUISA VARET, Deceased.

In the Matter of the Judicial Settlement of the Account of  
Proceedings of THOMAS L. FEITNER, as Executor, etc., of  
LOUISA VARET, Deceased.

In the Matter of the Final Judicial Settlement of the Account  
of Proceedings of THOMAS L. FEITNER, as Executor, etc.,  
of LOUISA VARET, Deceased.

In the Matter of the Judicial Settlement of the Supplemental  
Account to the Final Account of Proceedings of THOMAS  
L. FEITNER, as Executor of and Trustee under the Last  
Will and Testament of LOUISA VARET, Deceased.

ELVINA L. VARET and Others, Appellants; THOMAS L. FEITNER,  
as Executor, etc., of LOUISA VARET, Deceased, Respondent.

First Department, February 1, 1918.

**Executors and administrators — right to reasonable time within  
which to convert assets into cash — provision of will directing  
sale of assets construed.**

The general rule in cases of administration is that an executor or administrator is entitled to take a reasonable time within which to convert the assets of an estate into cash, and what is a reasonable time depends in each case upon the circumstances. If such executor or administrator acts in good faith and exercises his best judgment he will not ordinarily be held personally responsible when it appears in the light of after events that he would have displayed better judgment or have produced a more favorable result if he had sold earlier.

Notwithstanding the use in a will of the following words, "I do order and direct my executor hereinafter named, as soon as may be after my decease," to sell and convert into money all the real and personal estate, the discretion of the executor as to the time for selling securities remained unfettered, provided he acted in good faith, without neglect and in the honest exercise of his best judgment, and his accounts should not be surcharged with a shrinkage claimed to have resulted from a delay in selling securities.

PAGE and SHEARN, JJ., dissented, with opinion.

APPEAL by Elvina L. Varet and others from a decree of the Surrogate's Court of the county of New York, entered in the office of the clerk of said Surrogate's Court on the 27th day of January, 1917, settling the accounts in these proceedings.

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First Department, February, 1918.

*Carroll Berry*, for the appellants *Elvina L. Varet* and another.

*Gordon Gordon*, for the appellants *Emily R. Terriberry* and others.

*Daniel J. Mooney* of counsel [*Joseph A. Reynolds*, attorney], for the respondent.

SCOTT, J.:

This appeal is taken by certain legatees named in the will of *Louisa Varet*, deceased, from a decree judicially settling the accounts of the executor named in said will, the particular objection made to the decree being that the surrogate refused to surcharge the accounts of said executor with the difference between the inventoried value of certain securities included in the estate, and the prices at which these securities were sold by the executor.

*Louisa Varet* died on August 5, 1913, leaving a last will and testament which was admitted to probate on September 18, 1913, and letters testamentary issued to the executor named therein and who is respondent here. The estate was a considerable one and consisted in part of the securities as to which the loss referred to was suffered. These securities came into the executor's hands on September 30, 1913, and on October 22, 1913, an inventory of the estate was filed in the surrogate's office, and on the same day affidavits and schedules were filed with the tax appraiser. Prior to January 1, 1914, securities similar to those in question were dealt in upon the New York Stock Exchange and in the open market at prices approximating those at which the securities of the estate were inventoried, sometimes a little higher and more often a little lower. After January 1, 1914, prices steadily declined. The executor, who was a lawyer, and not engaged in any business having to do with dealings in such securities, consulted from time to time, as occasion offered, with gentlemen conversant with such matters and whose opinions as to the future course of prices were worthy of consideration, and as a result of such consultation he formed the opinion that better prices could probably be obtained in the autumn of 1914 than in the spring of that year. He did, however,

in March and April, 1914, sell some of the securities, yielding in this regard to the importunities of counsel for some of the legatees. Others he retained for sale in the autumn. In the meantime, however, the great war began, the Stock Exchange closed its doors, and prices of securities of all kinds depreciated seriously. The result was that when all the securities had been disposed of the prices realized showed a shrinkage of several thousand dollars below the inventoried values. For the amount of this shrinkage the appellants seek to have the executor charged personally.

There is no claim that the executor acted in bad faith, or that he reaped or could reap any personal advantage from his delay in disposing of the securities. It is specifically found: "That the executor exercised good faith in the administration of this estate," and this finding is not challenged by the appellants. Nor is there any basis that we can find for a claim that he neglected the duty with which he was charged. So far as appears he kept constantly in mind the fact that it was a part of his duty to form a judgment as to the proper time to dispose of the securities, and, if he delayed too long, it was due to an honest error of judgment, and to circumstances which no man could have foreseen. The general rule in cases of administrators is that an executor or administrator is entitled to take a reasonable time within which to convert the assets of an estate into cash, and what is a reasonable time depends in each case upon the circumstances surrounding the particular case, and if such an executor or administrator acts in good faith and exercises his best judgment he will not ordinarily be held personally responsible if it appears, in the light of after events, that he would have displayed better judgment, or have produced a more favorable result, if he had sold earlier. It was said in *Matter of Weston* (91 N. Y. 502) that "Where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard," although it was also held that "While such period furnishes a convenient guide where no special circumstances exist, it must, after all, not be taken as a fixed or arbitrary standard. The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs." There

is nothing in the present case to show that the executor failed to act up to this test. He undoubtedly acted as he did because he sincerely believed that in so doing he was acting in the best interests of the estate, and, after all, it was to his judgment and discretion that the testatrix had deliberately committed the management of her estate after her death.

The claim of the appellants is, however, and upon this their appeal mainly rests, that the language of the will was such as to impose an obligation upon the executor to make an immediate sale of the securities, irrespective of the condition of the market, and without exercising any judgment or discretion as to whether or not it would be advantageous to the estate so to do. The following is the language thus relied upon: "It is my will and I do order and direct my executor hereinafter named, *as soon as may be after my decease* to sell, either at public or private sale and convert into money all the real and personal property and estate of which I shall die seized and possessed." Insistence is laid upon the words "*as soon as may be after my decease*," which are deemed by the appellants to be equivalent to a direction to make a sale as soon as it *can be made*, that is, as soon as the securities come into the hands of the executor and he is in a position to give title to a purchaser, or within a very brief time thereafter. Such a construction of the language used is not in accordance with the authorities. The words "*as soon as may be*," or words of similar import, have frequently been judicially construed, and have been held to mean "*as soon as reasonably may be*." The direction to sell and convert into cash is undoubtedly peremptory, but the time of sale is still left to the reasonable discretion of the executor. As was said in the case from which we have already quoted: "Even where there is a direction to sell, reasonable time must be given, and what that is must be determined in each case by its own surroundings." (*Matter of Weston, supra*). In *Adams v. Foster* (59 Mass. 156) it was said, respecting a contract for the sale of a vessel: "The words of the covenant 'forthwith, as soon as may be,' 'for the largest sum that we can reasonably obtain' allowed a reasonable latitude, as to the time and manner of making the sale," and to the same



effect is *Bentley v. Ward* (116 Mass. 333). Even the words "as soon as may be," which in a sense are more restrictive than those relied upon by appellants, have been construed to mean within a reasonable time. (*Nunez v. Dautel*, 19 Wall. 560; *Simon v. Etgen*, 152 App. Div. 404; *Waddell v. Reddick*, 24 N. C. [2 Ire. L.] 424.) So, also, has been construed the phrase "as soon as possible." (*Arthur v. Wright*, 57 Hun, 22; *affd.*, 132 N. Y. 547; *McNally v. Phoenix Ins. Co.*, 137 id. 390.) And also the words "as soon as they conveniently can." (*Philadelphia, W. & B. R. R. Co. v. Williams*, 54 Penn. St. 103; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207; *Matter of Hodgman*, 140 id. 421.) In general where an absolute power of sale is given to an executor, the addition of words suggesting a time for its exercise does not limit the discretion of the executor. (*Robert v. Corning*, 89 N. Y. 225; *Deegan v. Wade*, 144 id. 573; *Chanler v. N. Y. El. R. R. Co.*, 34 App. Div. 305.) In the case last cited this court said (p. 307): "It is well settled that where an absolute power of sale is conferred upon an executor, the addition of words suggesting a time for its exercise, or indicating the testator's desire in that regard, do not restrain or limit the action of the executor."

Following this unbroken line of authorities we are constrained to hold that the words relied upon by the appellants are not susceptible of the peremptory construction sought to be applied to them, and that notwithstanding the use of these words in the will the discretion of the executor as to the time for selling the securities remained unfettered, provided as was the case here that he acted in good faith, without neglect and in the honest exercise of his best judgment.

For these reasons we think that the surrogate rightly refused to surcharge the accounts of the executor and that the decree should be affirmed, with costs to the executor to be paid by the appellants personally.

CLARKE, P. J., and LAUGHLIN, J., concurred; PAGE and SHEARN, JJ., dissented.

PAGE, J. (dissenting):

I cannot accept the opinion of the majority, that as a matter of law, where a will gives an executor power to sell,

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it vests a discretion in the executor as to time, which cannot be restrained or limited by the testator. In my opinion such a rule violates two fundamental canons of construction of wills. *First*, that a person has the right by will to dispose of his estate in any way that he desires, qualified only that he shall not contravene some established rule of law or public policy. *Second*, that the intention of the testator, as expressed in the will, must be given effect. Therefore, if the testator desires that his property shall be sold, and the proceeds thereof distributed, he has the right to specify the time, and direct the manner of the sale and distribution. If he desires to leave the time and manner to the discretion of the executor, it is competent for him to do so by such words as will aptly express such desire, or to simply give the power, without limiting words, in which case the law will imply that the power is to be exercised within a reasonable time. This, I understand to be the settled law of this State, nor am I aware of any decision to the contrary. While the quotation in the majority opinion from the case of *Chanler v. N. Y. El. R. R. Co.* (34 App. Div. 305, 307) would seem to give some support for the position there assumed, when those words are read in connection with the context and in consideration of the question determined, it will be seen that it gives no support to the proposition. That was the usual action of an abutting owner for an injunction and damages against the defendant for maintaining and operating an elevated railroad in the street. The plaintiff acquired the property from an executor who sold by virtue of the following clause of the will: "And upon the further trust to sell and dispose of said real estate as soon as he can sell and dispose of the same to advantage and best interest of my estate, but it is my desire that the real estate remain unsold until the expiration of five years after my decease, unless in the opinion of my executor \* \* \* my estate will be benefited by an earlier sale." The sale was made in four years after the testatrix's death. It was claimed that the power of sale was void, upon the theory that the power of alienation was illegally suspended, being for a period not measured by lives in being. The court said: "It is well settled that where an absolute power of sale is conferred upon an executor, the addition of words

suggesting a time for its exercise, or indicating the testator's desire in that regard, do not restrain or limit the action of the executor. (*Deegan v. Wade*, 144 N. Y. 573; *Robert v. Corning*, 89 id. 225; *Henderson v. Henderson*, 113 id. 1.) This rule has been applied to words much more peremptory than those in the case at bar. (*Deegan v. Wade*, *supra*.) The fact that an executor may require, in order to make a sale, a period of time not measured by lives in being, does not suspend the power of alienation; and in such a case a trust to receive the rents and profits pending sale for the benefit of beneficiaries is not illegal. (*Robert v. Corning*, *supra*.)" The question was a question of title between parties who were not concerned with the execution of the power of sale, otherwise than with the validity of the power to sell. It was not held that the testator had no right to limit or prescribe the time to sell, but that such a limitation as was imposed did not invalidate the power, as being against the statute of perpetuities. Furthermore, the will in that case gave discretionary power to the executor to sell "as soon as he can sell and dispose of the same to advantage and best interest of my estate," thereby vesting a wide discretion in the executor; that it should be held for five years is the expression of a mere desire which was also expressly limited by the same discretion in the executor.

Two of the above cases cited are also cited in the majority opinion in the instant case. *Robert v. Corning* (*supra*) was an action to construe a will, which directed the executors to sell certain real estate "at public sale in the city of New York, notice thereof having first been given of the time and place of sale for three successive weeks in four of the daily newspapers of the said city." The court said (p. 235): "Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to

receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being, who can, at any time, convey an absolute fee in possession."

The opinion, in so far as quoted above, was an authority upon the proposition of law that was before the court in *Chanler v. N. Y. El. R. R. Co.* (*supra*), which is in no manner involved in the instant case. The court further considered the requirement that the sale should be public and on specified notice. The right of the testator to make such requirements does not seem to have been questioned, those facts being presented as an additional suspension of the power of alienation, which the court held was untenable. The court did say, however (p. 238): "The direction that the real estate in this State should be sold at public sale on three weeks' notice, was a prudential arrangement to insure a fair sale and prevent a sacrifice of the property, and in no proper sense suspended the power of alienation. \* \* \* The act of 1837 (Chap. 460, § 43) provides that sales of real estate made by executors in pursuance of an authority given by any last will, unless otherwise directed therein, may be public or private. A public sale implies prior notice. The direction that the sale should be public was clearly valid, and it can make no difference upon the point now in question, whether the length of the notice (if reasonable) is prescribed by the testator or is left to the judgment of the executors."

In *Deegan v. Wade* (*supra*) the contention was that the provision of the will directing the executor to sell certain real estate "at some convenient day and place during the spring months of 1891" was void as suspending the power of alienation for a period not measured by lives. The court said (p. 576): "It is obvious that the direction as to the time to sell was advisory and \* \* \* was intended to facilitate the sale and not to limit or restrain the power of absolute disposition. The executor had the right to the ordinary period of administration, and this direction amounted to nothing more than a request that the sale be made at an earlier day." It appears clearly, in my opinion, that these cases are authorities for

the proposition that an absolute power of sale given to executors or trustees is not rendered void as suspending the power of alienation for a period not measured by lives, either by the non-action of the executor or trustee, by reason of the exercise of their own discretion or out of consideration for a request or an indication of the desire of the testator, and have no bearing upon the questions under consideration in the instant case.

The language used by the testatrix in the instant case is not a mere request or an expression of a desire. It is a mandatory requirement. It is as follows: "It is my will and I do order and direct my executor hereinafter named, as soon as may be after my decease to sell, either at public or private sale and convert into money all the real and personal property and estate of which I shall die seized and possessed." In my opinion this clause is mandatory, not only that the executor shall sell, but as to time of sale, which is to be "as soon as may be" after the decease of the testatrix. There are no words in the clause that imply discretion as to time of sale, such as "as soon as convenient," or when "he shall deem it advantageous" or "for the best interest of the estate." The majority of the court hold that these words add nothing, and apply the rule that would be applicable if these words were entirely eliminated. In construing a will, effect must be given to every word used by the testator. It is not to be presumed that words were idly used, and if in the ordinary use of language they have a well-defined meaning the presumption is that the testator intended that to be done which the language used fairly imports.

The effect of the words "as soon as may be," must be ascertained. The word "may" means "to have power; have ability; be able;" have opportunity. (Century Dictionary.) Therefore, used in their ordinary sense, the words "sell as soon as may be after my decease" mean as soon after my decease as the executor has the power, ability and opportunity to sell, he shall sell. While I do not find that this exact phrase has been judicially construed in this State, the words "may be" as used in the Constitution have been given the meaning above stated. The Legislature is required, after a State census, to so alter the Senate districts "that each

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Senate district shall contain as nearly as may be an equal number of inhabitants." (Const. art. 3, § 4.) It was held that this provision must be so construed "as to require that the Legislature in dividing the State into Senate districts make as close an approximation to exactness in number of inhabitants as reasonably possible in view of the other constitutional provisions, and that such approximation is the limit of legislative discretion." (*Matter of Sherrill v. O'Brien*, 188 N. Y. 185, 207.) Thus giving the words "as may be" to be as they are able to do under the circumstances. I have carefully examined all the cases cited in the majority opinion. A review of them might be valuable and will materially aid in formulating the rule to be applied in the case at bar. *Bentley v. Ward* (116 Mass. 333) deals with a statute relating to court practice requiring exceptions to be filed in the Supreme Court "as soon as may be" after the question of law was reserved and made a matter of record in the Superior Court. The court held that this prescribed no definite time, that the circumstances should govern, and said, "we are of opinion that in any case in which no special circumstances are shown, exceptions not entered in this court within a month after the final adjournment of the term at which they were allowed cannot be deemed to be entered 'as soon as may be.'"

In *Nunez v. Dautel* (19 Wall. 560), an agreement to pay a sum of money "as soon as the crop can be sold or the money raised from any other source," the court said: "The stipulations secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named, or the lapse of such time, the debt became due."

In *Simon v. Etgen* (152 App. Div. 399) the agreement was, on the receipt of a general release, to pay whatever sum might be realized on a sale of certain property over and above a certain amount, but only to the extent of a specified sum, which was held to create an obligation to sell the property within a reasonable time after receiving the release.

The case of *Waddell v. Reddick* (24 N. C. [2 Ire. L.] 424)

construed a contract by a planter to deliver cotton grown on his plantation "as soon as it can be picked out and shipped." It was held that he was not thereby restricted to the shortest possible time in which, by any means or upon any terms, he could convey the cotton to a seaport, but that he was only bound to employ the usual means of transportation, and, therefore, had a right to wait a reasonable time to avail himself of that mode. It appeared that he had availed himself of the usual mode at the earliest possible time and had paid an extra freight charge to expedite the shipment.

In *Arthur v. Wright* (57 Hun, 22; *affd.*, 132 N. Y. 547) the contract, dated May twenty-fifth, was for the sale of wheat in Duluth to be delivered in Buffalo as soon as possible. The court said: "It was the duty of the plaintiffs, under this contract to obtain the wheat and ship the same from Duluth with all reasonable dispatch, and to deliver the same in Buffalo in the usual course of lake navigation. \* \* \* The known difficulty of procuring transportation could furnish no excuse for delay. The defendants were entitled to an exact performance by the plaintiffs of their contract to ship promptly and to deliver within a reasonable time. Failing in this, they have no ground of complaint against the defendants for refusal to accept the wheat on the eighteenth day of June."

In *Tobias v. Lissberger* (105 N. Y. 404) old iron was sold "for prompt shipment by sail from Europe, and for delivery on dock at the port of New York." On the next day after the making of the contract, iron answering the description was shipped on board a vessel lying in a port upon a river in Germany which was then unnavigable by reason of being frozen over. On the first day possible the ship sailed, and after a voyage of ordinary length arrived at the port of New York. Held, not a compliance with the contract; the iron could have been shipped from any port in Europe and the defendants were entitled to such timely delivery as would follow an effective shipment.

In *McNally v. Phœnix Ins. Co.* (137 N. Y. 389) the policy provided that a sworn statement of proofs of loss should be furnished as soon as possible after the fire. Held, "The plaintiffs were doubtless bound to furnish them within a

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reasonable time, and no claim was or can be made that a delay of ten days was, as matter of law, under the circumstances, unreasonable."

*Philadelphia, Wilmington & Baltimore Railroad Co. v. Williams* (54 Penn. St. 103) was an action by Williams for trespass alleging that the company by the construction of a turnout from their main track to an engine house obstructed his right of way in an alley and a watercourse, claiming that the company had no right to build the turnout as the charter authorized it "as soon as they conveniently can, to locate and construct a railroad of one or more tracks" and "to make, construct and erect \* \* \* all the works and appendages necessary for the convenience of the said company for the use of said railroad." The court held: "The expression 'as soon as they can conveniently locate and construct' is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning, when the demands of business are few. It would be an unreasonable construction of its charter to require provision to be made for all the unknown wants of the future. The increase in trade and business, and the changes taking place, often require new and increased facilities."

In *Van Rensselaer v. Van Rensselaer* (113 N. Y. 207) the will provided: "I hereby give and bequeath to my sister Elizabeth the sum of ten thousand dollars, to be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm, \* \* \* or otherwise if it shall seem best to them." The court said: "He [the testator] knew that the amount and time of the sales would be uncertain, and, lest for that reason the general estate might be drawn upon to pay Elizabeth, he made her legacy payable at the convenience of the executor. But that convenience respected the situation of the estate, and not the choice or arbitrary will of the executor; and when money enough was realized from the sales to pay Elizabeth from that designated source, there was no excuse for further delay, the legacy became due and payable, and the executor who misappropriated the money, and the legatee who wrongfully accepted and retained it, became alike liable for its payment."



The case of *Matter of Hodgman* (140 N. Y. 421) throws no light upon the instant case. The will provided: "I desire the legacies to my wife paid as soon after my death as convenient to my executors." The wife was one of the executors and accepted the principal of the legacies without demur. Ten years later she demanded interest for delayed payment. The court held that there was nothing to show that the payment had been unduly delayed and that she was estopped from raising the question.

The case of *Adams v. Foster* (59 Mass. 156) is very illuminating. The action was brought to recover on an agreement that the defendants would "forthwith as soon as may be" sell a schooner "for the largest sum that they could reasonably obtain for her" and pay the proceeds to the plaintiff. At the time of the making of the agreement the schooner was at sea. She arrived two days later and two days thereafter sailed for Yarmouth for the purpose of obtaining a new register, the old one having been lost. Within eight or nine days thereafter she was wrecked. The Supreme Court approved of the charge of the trial judge "That the defendants were to have the time necessary to sell the vessel; that they were not to sell her for a nominal but for a reasonable sum; that *they were to take measures, immediately to effect a sale and were to sell her within such time as a man diligent in business could have sold her in the manner and for the object specified in the contract; that if her registry was lost, and a new registry would be necessary, before the vessel could be sold, they were to attend to that, and were to have the time requisite to perform all the acts necessary to complete the sale and vest the title; and that if the jury were satisfied that the defendants, acting as men diligent in business, could not have effected the sale before she was lost, they would not be liable.*" (Italics are mine.) In my opinion the underlying principles in these cases give the rules that should be applied in the instant case. The executor was required to immediately do the things necessary to enable him to complete the sale and vest the title in the purchaser, and when he had the ability to do this to offer the stocks for sale. There was a ready market for them as the larger proportion of the securities were daily dealt in upon the Stock Exchange, and the remainder had a ready market

in auction sales. The market for eight months after the executor qualified was normal and for at least sixty days thereafter prices could have been realized in excess of the inventoried value. The executor testified that he thought the securities had a higher value than the then market price, and that he talked the general situation over with financiers and others familiar with market conditions and came to the conclusion that the securities would command higher prices in the fall of 1914.

The residuary legatees filed objections to the account, and this appeal is concerned with the claim that is made by the residuary legatees that the loss to the estate occasioned by the delay in the sale of the securities should be charged against the executor and that the executor's account should be surcharged in the sum of \$8,100.90. The sales of the securities were made within eighteen months of the death of the testatrix. The residuary legatees claim, however, that as the will required that the executor should sell "as soon as may be after my decease," the executor's time was limited thereby in which to sell and that he should have sold within sixty days. There is, and there can be, no definite period of time within which an executor, who is directed to convert an estate into money, must sell the assets. Each case must be determined on its own facts, and the test to be applied in the absence of a mandatory direction to sell is, given the facts and conditions of the case, did the executor act with the diligence and prudence of prudent and intelligent men in the management of their own affairs? If he did, and loss ensues, he cannot be held liable. If he did not, then he must make good to the estate a resulting loss. There has been a disposition of the courts to recognize, in the period allowed for administration of the estate before an executor can be compelled to account, as fixing a reasonable period for the exercise of the power of sale. But "In this State, at all events, there is no arbitrary standard. The executor, here, cannot be compelled to account until after eighteen months; and yet it may be his duty to sell even earlier than that, or to wait even longer, according to the circumstances of particular cases, and the exigencies which exist. Where no modifying facts are shown to shorten or lengthen the reason-

able time, the period of eighteen months may serve as a just standard." (*Matter of Weston*, 91 N. Y. 502, 510.)

In the case at bar there was a very potent modifying fact to shorten the time, in the will of the testatrix in the execution of which her intention has controlling effect. The direction was for the executor to sell "as soon as may be after my decease." This phrase recognizes that some delay will be necessary to enable the executor to give title, and incident upon transfer tax and other proceedings, but the requirement is mandatory that when the executor is in position to do so he must sell in the absence of extraordinary conditions. It may be that a prudent business man dealing with his own securities in his possession and being under no obligation to sell, would have been justified by such considerations as here appear in holding the securities until the fall. But the executor was not in that position. The obligation on him was to sell as soon as he was able. The test is, did he discharge that obligation with the diligence that a prudent business man would had he been intrusted with the securities of another under similar instructions. In my opinion he did not, and, therefore, is liable to the estate for the loss that resulted, determined by the amount that the executor could have realized if he had sold promptly, which may be taken at the inventory value, less the amount actually realized, which was proved to be \$8,100.90, with which amount his account should be surcharged.

SHEARN, J., concurred.

Decree affirmed, with costs to executor to be paid by appellants personally.

In the Matter of the Judicial Settlement of the Account of  
CHARLES A. RUNK and DANIEL J. MOONEY, as Temporary  
Administrators, etc., of JESSIE GILLENDER, Deceased.

THE MISSIONARY SOCIETY OF SAINT PAUL THE APOSTLE IN  
THE STATE OF NEW YORK, Appellant; CHARLES A. RUNK  
and DANIEL J. MOONEY, as Temporary Administrators,  
etc., Respondents.

First Department, February 1, 1918.

**Executors and administrators — right of temporary administrator who is also an attorney at law to compensation for legal services — such administrator not entitled to commissions calculated upon fee value of real estate — Code Civil Procedure, section 2753, as amended, construed.**

Under section 2753 of the Code of Civil Procedure, as amended by chapter 596 of the Laws of 1916, providing that on the settlement of the account of any executor or administrator if he be an attorney and counselor at law and shall have rendered legal services in connection with his official duties, the surrogate must allow him such compensation for his legal services as shall appear to be just and reasonable, a temporary administrator who is an attorney and counselor at law is entitled to an allowance for his legal services rendered to the estate.

A temporary administrator is not entitled to commissions upon the fee value of real estate placed in his possession for the purpose of receiving rents and profits. He cannot be said to have "received" said property within the meaning of section 2753 of the Code of Civil Procedure, as amended by chapter 596 of the Laws of 1916, which provides that "The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions."

APPEAL by the Missionary Society of Saint Paul the Apostle in the State of New York from part of a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 9th day of August, 1917.

*Edward J. McGuire*, for the appellant.

*Charles A. Runk*, for the respondent in person.

*Charles H. Tuttle*, of counsel, for the respondent Daniel J. Mooney.

SCOTT, J.:

This is an appeal from a decree of the Surrogate's Court in the county of New York settling the accounts of the temporary administrators of the estate of Jessie Gillender, deceased.

Miss Gillender, the decedent, died on February 25, 1916, leaving a last will and testament by which she disposed of a considerable estate consisting partly of realty and partly of personal property. A contest arose over the probate of her will pending which the accountants were appointed temporary administrators of her personal property. They were also directed to take possession of her real estate and to receive its rents and profits, being authorized to make leases for terms not exceeding one year. They entered upon the performance of their duties and duly fulfilled them until May 23, 1917, when the will was admitted to probate and letters testamentary issued to the executors named therein.

The temporary administrators have presented their accounts to the surrogate and they have been settled and approved.

The appellant, the residuary legatee named in the will, makes but two objections to the decree, as follows: *First*, it objects to the allowance to one of the temporary administrators of a sum for counsel fees for services rendered to the temporary administrators; and *second*, it objects to the allowance to the other temporary administrator of commissions calculated upon the fee value of the real estate which forms a part of the estate.

As to the first objection:

One of the temporary administrators was Charles A. Runk, Esq., a capable and experienced member of our bar, who had been for a long time the friend and legal adviser of the decedent, and who was named as one of the executors of her will. It was arranged between the two temporary administrators that Mr. Runk should attend to such legal matters as might arise, and no question is made as to the extent or the value of his services.

Although temporary or special administrators, formerly termed collectors, have been provided for by statute ever since the year 1837 (See Laws of 1837, chap. 460, §§ 23, 24), no statute has ever specifically fixed their compensation, but it

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has long been the rule to compensate them at the same rate as is allowed by law to executors and administrators. (*Green v. Sanders*, 18 Hun, 308; *Matter of Duncan*, 3 Redf. 153; *Matter of Hurst*, 111 App. Div. 460; *Matter of King*, 122 id. 354.) And in a proper case it has also been the established rule to allow temporary administrators to pay reasonable counsel fees for services rendered in the course of the administration of the estate by them. (*Matter of Stokes*, 1 Dem. 260; *Matter of King*, *supra*.) Thus the compensation and allowance to be made to temporary administrators have been conformed by analogy to those made to executors and administrators. Prior to 1916 an executor or administrator could not receive any compensation, beyond his commissions, for legal services rendered to the estate. By chapter 596 of the Laws of 1916, section 2753 of the Code of Civil Procedure was amended in this regard so as to provide that "on the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this State, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable." This amendment does not in terms apply to temporary administrators, but since the fees and allowances to such administrators have in the past always been conformed to those allowed to executors and administrators, the same analogy should continue to be observed, and since Mr. Runk, if he had been acting as executor from June 24, 1916, to May 23, 1917, would have been entitled to an allowance for legal services rendered to the estate, he should receive a like allowance for legal services performed while he was temporary administrator. The amendment has raised the ban which before its enactment limited executors, administrators, etc., to their legal commissions, no matter how competent they may have been as lawyers, and how valuable may have been their legal services rendered to the estate. The passage of the amendment marks a change in the policy of the State in this regard, and in respect of fees for legal services there is now no reason why temporary administrators should not

stand upon the same footing as executors and administrators as they long have in other respects so far as concerns their commissions and the compensation of their counsel. So far as the first objection is concerned the appeal must fail.

As to the second objection:

Mr. David J. Mooney, one of the temporary administrators, claims and has been awarded commissions upon the fee value of the real estate comprised in the estate, in addition to his commissions upon the personalty and the cash which has passed through his hands. The basis for this claim, for which no precedent is cited to us, is found in that portion of section 2753 of the Code of Civil Procedure, as amended by Laws of 1916, chapter 596, which reads as follows: "The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise."

This clause relates only to property, whether real or personal, "received, distributed or delivered," and unless the temporary administrators may be said, in legal contemplation, to have "received" the real estate it is clear that they are not entitled to commissions upon its value. Ordinarily, executors and administrators, as such, have nothing to do with the real estate, and can neither "receive" nor "deliver" it, and temporary administrators stand in the same position. They are mere collectors or conservators of the personal estate, to hold and protect it until permanent executors or administrators are appointed. It is true that by section 2600 of the Code of Civil Procedure the surrogate may, as he did in this case, authorize a temporary administrator to take possession of the real property belonging to the estate and to receive the rents and profits thereof. It is quite clear that such an authorization does not confer upon a temporary administrator any title to the real property or any other right than to take such possession as may be necessary to collect the revenue therefrom. In no legal sense can he be said to "receive" the real property as that word is used in the section above referred to. His relation to the real property is exactly analogous to the frequent case of a receiver of the rents of mortgaged premises during the pendency of a foreclosure

suit. Such a receiver has authority to take possession of the realty for the purpose of collecting the rents, and may make such expenditures thereon for the preservation of the property as the court appointing him may authorize, but no court would listen for a moment to a claim by such a receiver that he should be paid commissions upon the fee value of the property which is the subject of the foreclosure suit. The claim of the temporary administrator has no better basis for its support. In so far as concerns the allowance to Mr. Mooney of commissions amounting to \$3,925 upon the fee value of the real estate the decree is erroneous and must be modified.

The decree will, therefore, be modified by reducing the commission allowed to the accountant Daniel J. Mooney to \$4,313.80, and as so modified affirmed, with costs to appellant and to Charles A. Runk, respondent, payable out of the estate.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Decree modified as stated in opinion and as modified affirmed, with costs to appellant and to respondent Runk payable out of the estate. Order to be settled on notice.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE LONG ISLAND RAILROAD COMPANY, Relator, v. THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT and OSCAR S. STRAUS and Others, as Commissioners, Constituting the Public Service Commission of the State of New York for the First District, Respondents.

First Department, February 1, 1918.

**Railroads — right of railroad company, ordered by Public Service Commission to change and alter its lines, to allowance for expense of removing tracks and structures of other companies.**

Where a railroad company, in order to make changes and alterations in its lines pursuant to a direction of the Public Service Commission under section 91 of the Railroad Law, is forced to shift and relocate the tracks of trolley companies and the sub-surface structures of a gas company



and a water company, after unsuccessful efforts to come to an agreement with said companies, with the knowledge of the Public Service Commission which took no action therein, said railroad company is entitled to have the expense of relocating said tracks and sub-surface structures allowed and apportioned when the work was completed.

It is also entitled to an apportionment of the fees paid to corporation inspectors pursuant to section 391 of the Greater New York charter.

CERTIORARI issued out of the Supreme Court and attested on the 21st day of June, 1917, directed to the Public Service Commission of the State of New York for the First District and to the Commissioners thereof, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings had in allowing and apportioning certain expense connected with the elimination of a grade crossing.

*Alfred A. Gardner* of counsel [*Joseph F. Keany* with him on the brief], for the relator.

*Oliver C. Semple* of counsel [*Robert J. Farrington* with him on the brief; *William L. Ransom*, attorney], for the respondents.

*Edward J. Crummey* of counsel [*Cullen & Dykman*, attorneys], for the intervening relator, the Newtown Gas Company.

*Vincent Victory* of counsel [*William P. Burr*, Corporation Counsel], for the city of New York.

SCOTT, J.:

The relator has sued out a writ of certiorari for the purpose of reviewing an order of the Public Service Commission for the First District allowing and apportioning the expense incurred by said relator in complying with the order of said Commission for the elimination of a grade crossing. The objection made to the order is that the Commission has refused to allow and apportion certain items of expense concededly incurred by relator in and about carrying out the elimination order.

In the year 1911 the Public Service Commission, on its own initiative and pursuant to section 91 of the Railroad Law (Consol. Laws, chap. 49 [Laws of 1910, chap. 481], as amd.), ordered the relator to make such changes and alterations in its lines at the intersection of Metropolitan avenue

and Fresh Pond road as would eliminate and abolish the grade crossing at that point. In order to make these changes it became necessary to shift and relocate the tracks of two trolley railroad companies operating on the surface, as well as the sub-surface structures of the Newtown Gas Company, and the Citizens Water Supply Company. The cost of doing this work was borne by the relator, and amounted to \$16,766.29, and no question is made as to its reasonableness. The Railroad Law (§ 94, as amd.) provides that the cost of making such a change of grade shall be borne in the proportion of fifty per cent by the railroad company, twenty-five per cent by the State and twenty-five per cent by the municipality within whose limits the change is made, and which in the present case is the city of New York. The expense is to be paid in the first instance by the railroad company, and at the conclusion and acceptance of the work an accounting is to be had before the Public Service Commission, when the amounts payable respectively by the railroad company, the State and the municipality are to be determined. All this has been done in the present case, but the Public Service Commission by the order referred to has refused to allow and apportion the above-mentioned sum of \$16,766.29, leaving the relator to bear the whole of that expense.

It is conceded that the work for which this expense has been incurred was necessary to be done by someone in order that the required change of grade should be made, and no question is made either but that the relator actually incurred the expense or that the cost was reasonable. *Prima facie*, therefore, it would appear that the relator was entitled to have this expenditure allowed and apportioned as part of the expense of eliminating the grade crossing.

The Public Service Commission, however, undertakes to justify its order by the argument that the expense of doing the work, while necessary to be done in order to eliminate the grade crossing, should have been paid for by the trolley companies and the water and gas companies, and a somewhat elaborate argument is made with a view to showing that each of these companies was bound to, and could have been compelled to shift and relocate its own structures to meet the changed grade. It is not necessary to consider at length

either that argument, or those holding an opposite view submitted by the relator and by certain intervenors. For the purposes of this appeal we assume that the several companies whose structures were interfered with could have been compelled by the exercise of proper authority to make the necessary shifting and relocation of those structures. (See *New Orleans Gas Co. v. Drainage Comm.*, 197 U. S. 453.) But the relator had no power to coerce the companies. That power, if it rested anywhere, rested with the Public Service Commission, and perhaps, so far as concerned the trolley companies, concurrently with the Commission and the board of estimate and apportionment. The record shows that relator made vigorous efforts to come to an agreement with the companies whose structures were to be dislodged and that the Public Service Commission had knowledge of these efforts, yet no action was taken by the Commission to exercise the authority which it now claims that it always possessed. The relator was, therefore, placed in this dilemma, that it must comply with the order of the Public Service Commission and in order to so comply the structures of the companies mentioned must be moved and relocated, yet it had no power or authority by any process known to the law to compel the companies themselves, at their own expense, to effect such shift and relocation. The only course left open to it was that which it adopted, viz., to arrange for the shift and relocation at its own expense, and seek an apportionment of such expense when the work was completed. As to the fees paid to corporation inspectors the expense seems also to have been necessary. In order to do the work it was necessary to open the streets for which a permit from the borough president was requisite. Section 391 of the Greater New York charter (Laws of 1901, chap. 466) authorizes the borough president to require payment of the estimated expense of inspection as a condition to granting such a permit. It may be that the engineers and inspectors of the Public Service Commission could, if required, have inspected the opening and closing of the street surface, but it does not appear that this was any part of their duty, and certainly the borough president was not bound to rely upon them.

The writ of certiorari must be sustained and the determina-

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tion of the Commission in the particulars specified be set aside, with fifty dollars costs and disbursements to the relator, the matter being referred back to the Commission for the entry of an order in accordance with this opinion.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Writ sustained, determination of the Commission set aside and matter referred to the Commission as stated in opinion, with fifty dollars costs and disbursements to relator. Order to be settled on notice.

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FISHER A. BAKER and Others, as Trustees of the Trusts Created by the Will of FERRIS S. THOMPSON, Deceased, Respondents, v. LOUISE GRASSET THOMPSON, Appellant, Impleaded with TRUSTEES OF PRINCETON UNIVERSITY and Others, Respondents.

First Department, February 1, 1918.

**Trust — application and limitation of rule that corpus of trust is to be maintained unimpaired — apportionment of proceeds of sale of right of trustees holding stock to purchase increased capital stock between principal and income — consent by beneficiary to the borrowing of money by trustees — election.**

The rule in *Matter of Osborne* (209 N. Y. 450), that the principal of a trust invested in corporate stock is to be maintained unimpaired and the remainder awarded to the life beneficiaries, is intended to be applied in a case where the surplus of the corporation or some part thereof is distributed by dividends in cash or stock, or where in liquidation of the corporation's business its assets are sold and the proceeds distributed among the stockholders, or where the corporation purchases the stock from the trustees, thereby in effect causing a partial liquidation of the assets. Said rule should be limited to those cases in which there is such a distribution of surplus.

The reason for the rule is that the surplus of the corporation represents accumulated income.

New shares of stock purchased by trustees in the exercise of subscription rights given to the stockholders and the proceeds of the sale of such subscription rights are capital of the trust estate to which the life beneficiary is not entitled. There is no distribution of surplus in such a case.

Hence, where a corporation increases its capital stock and gives its stockholders of record the right to subscribe for the new stock at par ratably

in proportion to their holdings, but such rights are not accompanied by any cash or stock dividend, trustees holding stock of said corporation in trust, who did not exercise the right to subscribe for the increased stock but sold said rights, properly credited the sum realized to the principal of the trust.

A beneficiary, who objected to a sale of sufficient stock held in trust for the purpose of paying a legacy and expenses of administration and consented to the trustees borrowing the sum required, is not entitled to object to the account of the trustees upon the ground that her income has been thereby diminished to the advantage of the principal, she having made an election which she cannot withdraw.

DOWLING, J., dissented.

APPEAL by the defendant, Louise Grasset Thompson, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 4th day of May, 1917, as resettled by an order made on the 8th day of May, 1917.

The judgment was rendered upon the report of a referee and the appeal is from the whole thereof, except in so far as it approves the account of the trustees, dated October 7, 1916, as to the trusts for Jane De Witt, Anna L. Roe, Katie Sullivan, Mamie Knipe and Mary Crafton, and except for the clauses of said judgment numbered "Seventh," "Ninth" and "Tenth."

*George S. Coleman* of counsel [*E. Crosby Kindleberger* with him on the brief], for the appellant.

*George L. Shearer* of counsel [*Morgan J. O'Brien* with him on the brief; *Stewart & Shearer*, attorneys], for the plaintiffs, respondents.

*Louis Dean Speir* of counsel [*Warren S. Bartlett* with him on the brief], for the respondent Princeton University.

*Tallmadge W. Foster*, for the respondent The New York Skin and Cancer Hospital.

PAGE, J.:

This action was brought for a judicial settlement of the accounts of the plaintiffs, as trustees of the trusts created by the will of Ferris S. Thompson, deceased. By virtue of the will of said Thompson the residuary estate was vested in the plaintiffs as trustees, so far as the questions raised in this

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appeal, consisting of 3,500 shares of the stock of the Chase National Bank to be held by them during the lifetime of his wife, the income therefrom to be paid to his wife and other beneficiaries therein mentioned. On the death of his wife, he bequeathed \$200,000 to Mercy Hospital and Mercy Orphan Asylum, and the remainder he bequeathed to Princeton University. By virtue of a trust agreement entered into in his lifetime, and of a judgment of this court in relation thereto, the said trustees became vested with 1,000 shares of the Chase National Bank stock, income thereof during the lifetime of his wife to be paid as provided in the trust created by his will, and on her death to be paid to Princeton University, Seaman's Church Institute and the Skin and Cancer Hospital. Thereafter the Chase National Bank increased its capital stock from \$5,000,000 to \$10,000,000 and its stockholders of record on September 7, 1916, were given the right to subscribe for the new stock at par ratably in proportion to their holdings, payment to be made on or before October 2, 1916. Such rights were not accompanied by any cash or stock dividend. The book value of a share of stock of the Chase National Bank at the date of Ferris S. Thompson's death was \$299.70; on the date of the establishment of the trust of the 1,000 shares by the trust agreement, \$300.94; on the date of the establishment of the trust of the residuary estate, \$301; on September 7, 1916, \$319.06; on October 2, 1916, \$317.60, and on October 3, 1916, \$208.80. The book value of a right to subscribe was \$108.80 on each share of stock. The trustees did not exercise the right to subscribe for the stock of the bank, but on September 12, 1916, sold said rights, realizing \$174 per share. The sum thus realized, \$609,000, on the rights incident to 3,500 shares and \$174,000 on the 1,000 shares, was credited by the trustees to the principal of the respective trusts. The appellant claims that the trustees should have apportioned the proceeds, crediting to principal sufficient to keep whole the value thereof which existed at the time of their creation, and that the remainder should be paid to the life beneficiaries as income. On this basis it is claimed that the proportion properly applicable to principal would be \$90.90 per share and \$83.10 to income, making \$409,054.95 to principal and \$373,945.05 to income. Support

for this basis of apportionment is claimed in the rule laid down in *Matter of Osborne* (209 N. Y. 450, 484, 485) that the corpus of the trust is to be maintained unimpaired and the remainder awarded to the life beneficiaries. "The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust." This rule is intended to be applied in a case where the surplus of the corporation or some part thereof is distributed by dividends in cash or stock or where in liquidation of the company's business its assets are sold and the proceeds distributed among the stockholders, or as was held where the corporation purchases the stock from the trustees, thereby in effect causing a partial liquidation of the assets. (*Matter of Schaefer*, 178 App. Div. 117; *affd.* on opinion of SCOTT, J., 222 N. Y. 533.) The rule in the *Osborne* case, both in reason and authority, should be limited to those cases where there is such a distribution of surplus. Prior to that case it was the law in this State that extraordinary dividends declared out of accumulated profits, whether paid in cash or by the issue of stock, went to the life beneficiary. In so far as such surplus was accumulated prior to the creation of the trust, this caused a depletion of the value of the capital of the trust to the unjust enrichment of the life beneficiary. The rule was established to correct this inequitable result, and is a limitation and not an extension of the rights of the life beneficiary, as it theretofore existed.

The reason for this rule is that the surplus of the corporation represents accumulated income. That portion which was earned prior to the creation of the trust added to the capital stock represents its book value at that time. The income which was reserved by the company during the period of the trust, if at any time, or in any manner distributed to the stockholders equitably should go to those who were entitled

to the income derived from the stock investment during the trust period. If, therefore, the stock purchased in the exercise of the right given on the increase of the capital stock of the corporation can be treated as dividends, then the rule expressed in the *Osborne Case* (*supra*) should be applied. It has uniformly been held in this State that new shares of stock purchased by trustees in the exercise of subscription rights given to the stockholders, and the proceeds of the sale of such subscription rights are capital of the trust estate to which the life beneficiary is not entitled. (*Matter of Kernochan*, 104 N. Y. 618; *Stewart v. Phelps*, 71 App. Div. 91; *affd.*, on opinion below, 173 N. Y. 621; *Robertson v. de Brulatour*, 188 id. 301; *Richmond v. Richmond*, 123 App. Div. 117; *affd.*, on opinion below, 196 N. Y. 535.) There is no distribution of surplus in such a case. The income which has been reserved is still intact and subject to distribution as dividends. If the trustees exercise the option and purchase the stock the amount received in dividends on such distribution will be the same, although the rate is diminished in the same proportion as the capital of the company has been increased. If the trustees sell the rights the proceeds become a part of the capital and the life beneficiary will receive the interest or income derived therefrom on its investment. The right to subscribe is an incident to the ownership of the stock. Any value that attaches thereto properly goes to the enhancement of value of the stock which, not being the product of income, nor taken from income, is not to be distributed to those entitled to income. The capital of the trust is enhanced in value, and the income is increased by the result of the larger sum invested. The trustees have, therefore, properly credited the cash received from the sale of these rights to the principal of the trust estates.

The other objections raised by the appellant to the account of the trustees relate to a transaction whereby, to pay a legacy and expenses of administration, money was borrowed upon a pledge of the stock, instead of a sale of sufficient stock to pay. But as she at the time objected to the sale of the stock, and consented to the trustees borrowing the amount she cannot now object. She claims that her income has been thereby diminished to the advantage of the principal. Had



the stock been sold, the income would have been diminished. She insisted that the stock should be retained and the money borrowed, and thereby made an election which she cannot now withdraw.

The judgment should be affirmed, with costs.

CLARKE, P. J., and LAUGHLIN, J., concurred; DOWLING, J., dissented.

Judgment affirmed, with costs.

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**BOTHO FARENHOLTZ, Respondent, v. HENRY MEINSHAUSEN, Appellant.**

First Department, February 1, 1918.

**Trial — action by citizen and resident of Germany against citizen of United States — continuation of action by personal representatives of deceased plaintiff — abatement — suspension of Statute of Limitations during war.**

Where, in an action commenced on May 12, 1914, by a citizen and resident of the German Empire against a citizen of the United States residing in Chicago, upon a cause of action arising in said city, jurisdiction was obtained by attaching a claim of the defendant against a domestic corporation having its place of business in the county of New York, and the defendant appeared and answered, and a reply was served on October first, and the cause of action placed on the calendar for trial, where it still remains, and it appears that the plaintiff died in Germany in July, 1915; that no application has been made to substitute personal representatives to prosecute the action; that plaintiff did not write for the documents necessary to apply for ancillary letters or to enable personal representatives to be substituted as parties plaintiff until more than sixteen months after the plaintiff's death, he has failed to show the diligence which should be exercised, and an order should be granted that the action abate unless it be continued by the personal representatives of the deceased within one year.

The fact that the defendant has given a bond does not affect the circumstances as he is put to unnecessary expense by the continued delay.

The abatement of the action will not deprive the personal representatives of ability to prosecute the same after the war is over, if they are so advised. The Statute of Limitations is suspended during the war as between the citizens of belligerent powers.

The fact that the action cannot be prosecuted during the period of the war is no reason why the personal representatives of the plaintiff should not demonstrate their intention of prosecuting it as soon as possible.

APPEAL by the defendant, Henry Meinshausen, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of April, 1917, denying his motion for an order requiring this action to be continued by the personal representatives of the deceased plaintiff or in default thereof that the action be abated.

*William E. M. Reynolds* of counsel [*Frederick C. Hunter* with him on the brief; *McReynolds & Hunter*, attorneys], for the appellant.

*Daniel P. Hays* of counsel [*Hays, Hershfield & Wolf*, attorneys], for the respondent.

PAGE, J.:

This action was commenced on May 12, 1914, by a citizen of the German Empire and a resident of Magdeburg therein against a citizen of the United States residing in Chicago, Ill., upon a cause of action that arose within that city. Jurisdiction was obtained by attaching a claim of the defendant against a domestic corporation, having its place of business in the county of New York. The defendant appeared and served an answer on July 10, 1914. An amended answer was served on September 11, 1914, containing a counterclaim greatly in excess of the plaintiff's cause of action. A reply was served on October 1, 1914, notices of trial were served and the cause placed on the trial calendar of the Supreme Court for the December term, 1914, and still remains thereon. The plaintiff died in Magdeburg in July, 1915, and no application has been made to substitute personal representatives to prosecute the action. The excuses presented by the plaintiff's attorneys are the disturbed conditions of the mails and transportation between this country and Germany since August, 1914, culminating in a state of war between the countries in April, 1917. Communication between the countries through neutral nations has been possible, and is even now, through a Federal license. Six months or more was allowed to elapse while the attorneys were pursuing a fruitless search for information that could only have effectively been obtained in Germany. When they did finally write they

obtained a delayed reply inclosing a certified copy of some document, the character of which is not clearly revealed in the affidavits, and not until November 24, 1916, more than sixteen months after the plaintiff's death did they write explicitly for the documents necessary to apply for ancillary letters or to enable the personal representatives to be substituted as parties plaintiff, and four months later they state that no reply has been received. This does not show the diligence that should be exercised where the property of a resident of another State has been impounded in this jurisdiction. That the defendant has given a bond does not affect the principle. He is put to unnecessary expense by the continued delay. There is no reason why the necessary steps should not be taken to revive this action within a reasonable time, if it is the intention of the personal representatives in good faith to prosecute it.

An abatement of this action will not deprive them of ability to prosecute their cause of action after the war is over if they are so advised. The Statute of Limitations is suspended during the war as between the citizens of belligerent powers. (*Semmes v. Hartford Ins. Co.*, 13 Wall. 158.) The courts of Illinois, both Federal and State, will be open to them, even if the courts of this State should not then be available. That this action cannot be prosecuted during the period of the war (*Rothbarth v. Herzfeld*, 179 App. Div. 865) is no reason why the personal representatives of the plaintiff should not now demonstrate their intention of prosecuting it as soon as they may be able to do so, and place themselves in position to have the action tried as soon as possible.

Under the circumstances the longest time provided by law may be given.

The order is, therefore, reversed and the motion granted for an order that this action abate unless it is continued by the personal representatives of the deceased within one year after the service of a copy of the order with notice of entry upon the firm who were plaintiff's attorneys.

CLARKE, P. J., DOWLING, SMITH and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted as stated in opinion.

ANNIE T. SULLIVAN, Appellant, v. THE BOARD OF EDUCATION  
OF THE CITY OF NEW YORK, Respondent.

Second Department, January 18, 1918.

**Schools — city of New York — salary of teachers — judgment — res  
adjudicata.**

A schedule adopted by the board of education of the city of New York, under the Davis Act (Laws of 1900, chap. 751, § 4), giving to a critic teacher the same salary as a model teacher, although the critic teacher was a regular teacher within the meaning of the statute, is invalid, and such teacher may recover for loss of salary incurred by being so classified. But such teacher in a subsequent action cannot relitigate her rights for the period covered by the first action.

Such a critic teacher is an assistant teacher within the meaning of chapter 902 of the Laws of 1911, and is entitled to salary according to the general schedule for assistant teachers in force when said act took effect.

APPEAL by the plaintiff, Annie T. Sullivan, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 5th day of February, 1917, dismissing the complaint on the merits upon the decision of the court, a jury having been waived.

*Albert W. Seaman* [*Delany & Niper* with him on the brief], for the appellant.

*Charles McIntyre* [*Lamar Hardy, Corporation Counsel*, and *Terence Farley* with him on the brief], for the respondent.

THOMAS, J.:

In January, 1899, there was issued to plaintiff "An assistant teacher's license (permanent) to act as a critic teacher in a training school for teachers in the borough of Brooklyn," and she was appointed by the school board a regular teacher in such school, and has since that time held such position. March 8, 1913, the plaintiff sued the board of education and established by judgment entered January 4, 1915, on defendant's offer of judgment of December 29, 1914, for \$1,956.13, that defendant by a by-law of July 16, 1900, had fixed a minimum salary for a female regular teacher at the sum of \$1,100, with

an annual increase of \$80 to a maximum salary of \$1,900, and that for the year 1907 (her ninth year) she was entitled to \$1,740, and was paid \$1,500; for 1908 (her tenth year) to \$1,820 and was paid \$1,500; for the years 1909, 1910 and 1911 (her eleventh, twelfth and thirteenth years) to \$1,900, and was paid \$1,500, and for the year 1912 (her fourteenth year) to \$1,900 and was paid \$1,850. So she fixed her status as a regular teacher at the close of the year 1912 (her fourteenth year), entitled to the maximum salary of \$1,900. The judgment accorded with the Davis Act (Laws of 1900, chap. 751, § 4, amdg. Laws of 1897, chap. 378, § 1091), which declares that a female regular teacher should not receive less than \$1,100 per annum, nor after ten years of service as such less than \$1,900 per annum. There were conditions unnecessary to discuss. The judgment proves compliance with them. She arrived at the salary due her, and at the yearly increment, by accepting the provision for regular teachers in schedule XI adopted by defendant on July 16, 1900, in purported compliance with the Davis Act, and readopted March 26, 1902, after the revision of the charter (Laws of 1901, chap. 466), containing section 1091 of the Davis Act. The schedule had a column with the caption "Assistant (Reg.) Teacher," which showed \$1,100 for the first year and \$1,900 for the eleventh year, and was in full obedience to the requirement of the Davis Act as to regular teachers. But that column was not intended to refer to critic teachers, for the by-law provided: "The critic teachers shall receive the same salaries as model teachers." That direction was contrary to the Davis Act and was void. Hence, the schedule for assistants with no valid exceptions brought plaintiff into the proper classification, and the judgment was quite proper. The judgment does not in terms purport to adjudge that plaintiff was an assistant teacher, but she was one. Earlier by-laws and schedules had given the critic teacher the same salary as an assistant teacher. On June 28, 1898, the school board adopted a salary schedule whereby critic teachers and assistants to the faculty were paid the same salaries, arranged under a column headed "Assistants to Faculty," and it was provided that "no person shall be appointed critic teacher or assistant to the faculty, who does not hold a critic teacher's certificate."

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But there were teachers called critic teachers, and teachers called assistants to the faculty. The schedule of salaries indicates that then the faculty was composed of head teachers with one salary, assistants with less, critics with the salary of assistants, and model teachers with less salary. The schedule adopted on July 5, 1899, and obtaining when the Davis Act was passed, provided salaries for principal, head teacher or head of department, assistant to faculty or critic teacher, and model teacher, and definitely states that "A critic teacher or assistant to the faculty shall receive" salaries of the same increasing amounts. For the purposes of salary, critic teachers and assistants to the faculty were the same. In training schools were elementary classes taught by model teachers. The students in the training schools observed the model teachers in their work and were taught by the assistant teachers, and in time such students practiced teaching in the elementary schools under the observation, criticism and rating and report of the critic teachers. In such state of affairs came the Davis Act of 1900. It empowered the board of education to fix salaries and the annual increase, if any, subject to certain limitations as to minimum salaries. Then, as already stated, the board of education, on July 16, 1900, and March 26, 1902, adopted schedule XI. The obvious illegality of the schedule is that it gave to a critic teacher no more than the salary of a model teacher, whereas the critic teacher was a regular teacher and the Davis Act provided that "no female regular teacher in said schools shall receive less than eleven hundred dollars per annum, nor after ten years of service as such, less than nineteen hundred dollars per annum," while it fixed the minimum salary of a model teacher at \$1,000, and the maximum at \$1,500. It was in view of that error that the plaintiff first sued, demanding that she be paid as a regular teacher, for which the Davis Act and the schedule of the years 1900 and 1902 made ample provision. It is to be noted that when plaintiff brought the suit in March, 1913, demanding increased payment as a critic teacher, there had been another statute passed (Laws of 1911, chap. 902) and other schedules adopted which, if applicable, gave her a larger salary with a larger annual increment than in her complaint in her first action she claimed.

For, on May 24, 1911, the board adopted a schedule that provides for a salary for "assistant teachers" progressing to \$2,750 for the thirteenth year, which is entirely out of accord with the schedule the plaintiff claimed for herself in her first action from her ninth to fourteenth years of service. The schedule of May 24, 1911, preserved the error of the schedules of July 16, 1900, and March 26, 1902, by allotting the critic teacher the salary of the model teacher. Also, before her first suit was brought, there had been enacted chapter 902 of the Laws of 1911, become a law October 30, 1911, and thereupon, on November 29, 1911, the school board had adopted schedules to take effect January 1, 1912, under which plaintiff did not claim in her first action, begun March 8, 1913, but under which, if applicable, plaintiff could have recovered on the basis of \$2,150 for her ninth year, with a yearly increment to \$2,750 for her thirteenth year, provided she had fulfilled applicable conditions. In this action she does claim at the rate of \$2,750 for the years 1912 to and including April, 1915. The first action covered the year 1912, and she cannot relitigate her rights for that year. The schedule of November 29, 1911, again ascribed to her the salary of a model teacher, which, as to a regular teacher, was in violation of the Davis Act and the act of 1911, and on January 1, 1914, the schedule for model and critic teachers was amended so as to provide for a salary of \$2,050 for the ninth year, which exceeded the minimum salary of \$1,900 after the tenth year for regular teachers. But the action of the board was too tardy, as the statute of 1911 has confirmed to critic teachers the higher salaries contained in the schedules of May 24, 1911. Since January 1, 1914, plaintiff has been receiving \$2,050. For the year 1913 she received only \$1,850, whereas she should have had at least \$1,900, and the defendant concedes that she should have judgment for \$44.70 rather than \$50, upon the ground that the first action was begun March 8, 1913, and that she could have recovered on the basis of a \$1,900 salary, the 1913 salary to that date. However that slight difference should be adjusted, I conclude that she should recover much more. For the important question is now whether for periods after her first action plaintiff may recover, not only as a regular teacher as she did before, but also as

an assistant teacher under the schedules adopted on May 24, 1911, and confirmed by the act of 1911 and readopted November 29, 1911. The plaintiff's argument is (1) that she is a regular teacher, which is undoubtedly correct; (2) that she is also an assistant teacher; (3) that assistant teachers for the years here involved are paid \$2,750 per year, if proven of sufficient merit, which is correct. Her conclusion is that she is entitled to \$2,750 per year. This brings the inquiry critically to the second term of her premises. Is plaintiff an assistant teacher, and, if so, could the board of education make one grade of salaries for assistant teachers other than critic teachers, and a less salary for the critic teacher? I consider it first in view of the Davis Act of 1900. Before entering upon it, attention is directed to the history of which partial survey has been had, and which shows that critic teachers have in all schedules been treated separately under the name of critic teachers; that plaintiff was licensed as *an assistant teacher to act as a critic teacher*, and was appointed to serve as a critic teacher; that her work was that of a critic of scholars acting as teachers, whom assistant teachers instructed; that since 1902 licenses to critic teachers have run to them as such; that at the time of plaintiff's appointment the by-laws of the board of education of the city of New York provided for licenses (and such other as the school board of a borough should designate) graded in training schools to assistant teacher, first assistant teacher or member of faculty, principal; that the general rules provided that "No one shall be appointed or promoted to teach principles of education or methods of teaching or as critic teacher in a training school for teachers who does not hold an assistant teacher's license to teach in a training school, or a license of higher grade;" that the school board of the borough of Brooklyn, empowered as above shown, adopted a by-law that licenses for training schools for teachers should include certificates for model teachers, critic teachers, head teachers and principals; that the requirements for critic teacher were at least equal to those of assistant teacher; that an assistant teacher must hold a critic teacher's certificate; that by the schedules of June 28, 1898, and again by those of July 5, 1899, the salary of a critic



teacher was declared to be the same as that of assistants to the faculty; that it was not until the schedule of July 16, 1900, that the school board in matter of salary attempted to differentiate a critic teacher and assistant teacher, and that since that date they have continued so to do, not only in matter of salaries, but since June 25, 1902, in kinds and grades of licenses, with eligibility for the license for a critic teacher stated, and for an assistant teacher differently stated, with what equality or superiority of qualification to the one or the other I do not attempt to decide. It is apparent that during the earlier period critic teachers were in the schedules designated in a class by themselves, with duties unlike other teachers, with qualifications similar to assistant teachers and with a like value ascribed to their services. But after the passage of the Davis Act, they were still kept distinct in name, salary, and maybe in qualifications, from assistant teachers. Did the Davis Act permit that? That act did not name critic teachers. It did provide in training schools for model teachers, regular teachers, head teacher, assistant to the principal, first assistant and vice-principal, and minimum salaries in different amounts are provided (1) for model teacher; (2) for regular teacher; (3) head teacher, assistant to principal, first assistant and vice-principal, in one group. The schedules of 1900 keeping model teachers separate, as it should do, provided for "Assistant (Reg.) Teacher" at one rate, and "First Assistant" at another. That the Davis Act permits, because it refers to regular teachers, and also to first assistants. But must the schedules include critic teachers in the same salary class as assistants? The Davis Act contemplates that there may be regular teachers, who are not to be paid either as female assistants to the principal or as first assistant, for its so provides. All are regular teachers, and all regular teachers are assistant teachers. Of what avail to prescribe minimum and advancing salaries for regular teachers, and another scale of salaries for assistant to principal, and first assistant, if it was intended that all regular assistants should be paid according to a common scale? The Davis Act (§ 4) provides: "The board of education shall have power to adopt by-laws fixing the salaries of the borough and associate superintendents, and all members of the supervising and the teaching

staff, and the salaries of all principals and teachers shall be regulated by merit, grade of class taught, length of service, experience in teaching, or by such a combination of these considerations as said board may deem proper. Such by-laws shall establish a uniform schedule of salaries for the supervising and the teaching staff throughout all boroughs which schedule shall provide for an equal annual increment of salary of such an amount, \* \* \* that in high schools and training schools for teachers" model teachers, regular teachers and head teachers, assistant to the principal, first assistant and vice-principal, shall receive not less than the minimum salaries stated in the act. The board of education in fixing salaries must consider "merit, grade of class taught, length of service, experience in teaching," and by such things, "or by such a combination of these considerations as said board may deem proper," fix the salaries. But how can it weigh the merits of assistant teacher, and of what avail to do so, if it must advance alike all of them? There must be a "uniform schedule of salaries for the supervising and the teaching staff," and the "equal annual increment for each class or grade \* \* \* shall be uniform throughout each class or grade, and each of said persons shall at once receive all the emolument in accordance with the above schedule of minimum salaries to which said person is entitled by reason of merit, of experience and of grade of class taught." But what is "each class or grade" as to which uniformity must prevail? The board fixes grades by measuring the capacity and merit and service. If assistant teachers are exempt from grading, save in one group, grading ceases from impossibility of finding material to grade. Hence, I think that the statute did not constrain the board to group all regular teachers under one head with one uniform salary and increases. But the minimum must always be observed, and there the board failed. The board, at least from January 1, 1914, has rated critic teachers upon a salary of \$2,050. That more than meets the demand of the Davis Act. But the difficulty is that before it did that the act of 1911 vested rights in the plaintiff that gave and continues to her a higher salary. On October 30, 1911, when the act of 1911 took effect, the schedule of May 24, 1911, was in force, except the part that gave the

critic teachers only the salaries of model teachers, which was void, as a violation of the Davis Act. What was the result? The critic teacher not being legally excepted, fell into the regular class of assistant teachers. For I cannot conceive that a critic teacher is not an assistant teacher. Section 1091 of the Greater New York charter (Laws of 1911, chap. 902) gives the board of education power to fix salaries. But there is provision that "The salary, including the annual increment, to which a present member is entitled under a specific salary schedule now existing shall not be reduced. Beginning with the first day of January, nineteen hundred and twelve, third month following the taking effect of this act the salaries, including the annual increments, of all members shall be not less than those fixed in the schedules and schedule conditions approved by the board of education on the seventeenth and twenty-fourth days of May, nineteen hundred and eleven." Above I have concluded that plaintiff was at the passage of the act entitled to a salary according to the general schedule of May 24, 1911, for assistant teachers. The act of 1911 confirms it to her. On November 29, 1911, the board tried again to put her in the model teacher's class. The schedule was void under both the Davis Act of 1900 and the act of 1911. Again, in 1913, the board placed critic and model teachers in the same schedule with a maximum of \$2,050. That is less than plaintiff was entitled to when the act of 1911 confirmed to her a salary under the schedule of May 24, 1911, for assistant teachers with right to advance, which includes increments, if she acquired superior merit, to \$2,750. Hence, she should be paid for the years 1913 and thereafter according to that schedule, but it would seem that she cannot advance beyond the salary of \$2,150, the salary for the ninth year, because she has not qualified as a teacher of superior merit. It is true that her judgment shows that she was entitled to an assistant's salary for the fourteenth year, but, as I understand, the conditions precedent were different. In any case, she is entitled to \$2,150 for the year 1913 and thereafter. That the defendant concedes to her if she is entitled under the existing assistant's schedule. The effect of this discussion is that the board of education under the Davis Act could, for the purposes of salary, have distinguished

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critic teachers from other assistant teachers, but that its provision in that direction was illegal and void, so that when the act of 1911 took effect critic teachers fell under the salary schedules of assistant teachers, and by the act of 1911 such salaries were confirmed to them.

The judgment should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., MILLS, RICH and PUTNAM, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

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BERTHA FRANKEL, Appellant, v. MAX WOLPER, Respondent.

Second Department, February 1, 1918.

**Physicians — obligations of physician towards patient — agreement to cure disease — liability for malpractice — pleading — complaint stating action for malpractice — limitation of action.**

The contract of a physician to cure a patient does not mean that in case of failure he will pay the damages resulting from the malady continuing, or for the results of his lack of skill or ignorance, or for the physical consequence, or for treatment by other physicians necessitated by the patient's condition.

While a contract to cure a patient does involve the elimination of the patient's condition, the physician cannot be held responsible for suffering from a cause which he agrees to end but does not end, unless he is guilty of malpractice.

A physician must have skill, care and judgment and use them, and if he fails to use them and pain results therefrom, whether or no there be ultimate cure, he is liable.

*It seems*, that where a physician agrees to cure a patient and fails to do so the patient is absolved from payment and may recover advances made and expenditures for nurses, medicines, etc.

Complaint in an action brought by a patient against a physician examined, and *held*, not to state a cause of action for breach of contract but one for malpractice and negligence and that the complaint was properly dismissed as the Statute of Limitations had run upon the latter action.

APPEAL by the plaintiff, Bertha Frankel, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 9th day

of March, 1917, upon the dismissal of the complaint at the opening.

*Alfred B. Nathan*, for the appellant.

*Edwin A. Jones*, for the respondent.

THOMAS, J.:

The question is whether this action against a physician is for breach of contract or malpractice. If for the latter, it is barred by a Statute of Limitations, whether it arose from lack of requisite skill or negligent exercise of it. The question is not whether the plaintiff could declare on a contract to cure her, and for the breach of it recover damages for failure to make the cure. For instance, in such case sums paid on the contract would be subjects of recovery, and probably other items of damage that flow naturally from failure to do an agreed thing. But the present complaint manifests no such cause of action. It alleges in effect representations by the defendant of skill and carefulness in his calling, the plaintiff's reliance thereon in entering into a contract with defendant "to attend to and cure her of" her malady, describing it, wherein and whereby the defendant agreed to use care and learning to cure the plaintiff, and his best judgment in exercising his skill and applying his knowledge, and that he would use methods approved in his profession to effect a cure, "and would attend to and care for the plaintiff and cure her of the said malady." Then follow allegations to the effect that defendant entered upon the performance of the contract, but in violation of it used neither the agreed care and diligence in the exercise of his skill and application of his learning in treating plaintiff, nor his best judgment, nor the approved methods, and lanced plaintiff's affected breast dilatorily and improperly, improperly drained it, made too infrequent changes of bandages, did not properly sterilize the bandages and instruments, and that there appeared on the affected breast abscesses or swellings "as a result of the defendant's failure to properly perform his contract," and after some amplification it is alleged, in effect, that defendant advised her that her malady was slight and did not require the services of another physician, and that on her insistence he called in a specialist,

whom defendant had employed to perform the operation, and that the defendant, when plaintiff was under the influence of an anæsthetic, himself performed the operation, but did not use skill, learning and judgment in accordance with the contract, "and solely as a result thereof," plaintiff was obliged to submit to another surgical operation described, "and that solely by reason of the defendant's breach of contract of employment as aforesaid, the plaintiff was not cured of her said malady and suffered from the result thereof, and she was and became sick, sore and disabled and suffered from pain and a nervous breakdown, and was confined to her bed a considerable length of time, and her injury is a permanent one, and she has been obliged to expend a considerable sum of money for medicines, medical services, drugs and various appliances in endeavoring to be cured." It may be inferred from the complaint that the plaintiff's physical condition was affected permanently, (1) by defendant's negligent treatment; (2) by operations by others necessitated by defendant's failure to cure her; (3) by the continuance of her malady, and that she has expended sums of money in endeavoring to be cured. The defendant would not be liable *upon his agreement to cure* for plaintiff's pains and disability resulting from the conditions to be cured, nor for pains and disabilities caused by defendant's ignorance or lack of skill, nor for pains and disabilities caused by subsequent operations to cure her of her malady or to avert the consequences of defendant's lack of skill or failure to perform his contract, nor expenses to alleviate any such pains and disabilities. The contract to cure was not that the defendant would upon failure pay the damages resulting from her malady continuing, or for the results of his lack of skill or ignorance, or for the physical consequences of treatment by other physicians necessitated by her condition. The thing he undertook was to cure her. That did, indeed, involve the elimination of the condition that begot suffering and disability. But a physician cannot be held responsible for suffering from a cause which he agrees to end but does not, unless he is guilty of malpractice. He must have skill, care and judgment and use them, and if he fail to use them, and pain results therefrom, whether there be or not ultimate cure, he is liable. That culpability results

from the duty the law attaches to the undertaking. I would say also that where a physician, with whatever prudence, agrees that his treatment will cure, and it does not, the patient is absolved from payment, may recover advances, may recover expenditures necessitated for nurses and medicines, and, may be, for something else. But such are not the damages stated here. If the complaint otherwise permitted a conclusion that the action was on contract, the misstatement of damages need not disturb it. But here the damages alleged are unsuited to an action on contract, and help to characterize the complaint as one for malpractice and negligence. It is useless to discuss the authorities, as the decision is placed upon the ground that the complaint does not declare on contract.

The judgment should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, RICH and BLACKMAR, JJ.

Judgment unanimously affirmed, with costs. [This decision was affirmed without opinion in 228 N.Y. 582 (1920).]

In the Matter of JACOB N. FLOWERMAN, an Attorney,  
Respondent.

First Department, February 1, 1918.

**Attorney at law — disbarment — conversion of client's moneys — purpose of disciplinary proceedings — repayment of money does not condone offense.**

Attorney at law disbarred for converting to his own use moneys of his client specifically intrusted to him for a definite purpose.

Disciplinary proceedings are not instituted for the purpose of collecting debts owing by an attorney to his client, but for the purpose of inquiring into the professional conduct of the attorney and to determine whether he is a fit person to continue as a member of the bar.

A payment while the proceeding is pending of the moneys claimed in no way condones the offense charged and under investigation.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Einar Chrystie*, for the petitioner.

\_\_\_\_\_, for the respondent.

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First Department, February, 1918.

CLARKE, P. J.:

The respondent was admitted to practice as an attorney and counselor at law in the State of New York at a term of the Appellate Division, First Department, in April, 1913, and was practicing as such attorney in the First Judicial District at the time he committed the acts complained of.

In September, 1916, he was retained by J. M. Spar & Co. to defend an action brought against it. The case was tried and resulted in a judgment for the plaintiff in the sum of \$180.50. On or about October 11, 1916, respondent wrote to Mr. Spar advising that he send a check for the amount of the judgment so that it could be satisfied at once thus avoiding the issuance of an execution and additional costs. Mr. Spar sent the respondent a check for \$180.50 payable to the respondent's order with the understanding that he was to use the proceeds thereof to satisfy the judgment. Instead of using the money for that purpose the respondent immediately caused the check to be certified and thereafter had it cashed and converted the proceeds to his own use. As a result of this misconduct execution was issued against his client and it was obliged to pay in satisfaction of the judgment the further sum of \$180.50 together with about \$9 additional costs. After sending a number of telegrams and letters in which he admitted the conversion and promised to pay he rendered an obviously false and padded bill in which he claimed a balance due him of \$113.76 from the company, but upon the evening before a hearing was to be held before the grievance committee respondent gave to J. M. Spar & Co. a check for the sum of \$189.45, the amount it was obliged to pay in satisfaction of the judgment.

The respondent interposed his affidavit in answer to the charge which admitted the facts alleged in the petition and set up matters in excuse and avoidance which upon the indisputable evidence were false. He appeared before the learned official referee to whom the matter had been sent upon the first hearing and asked for an adjournment, but did not thereafter appear, and no evidence was offered in his behalf, and he did not appear upon the motion made upon filing of the referee's report. The learned official referee has reported that the respondent has been guilty of the professional mis-



conduct charged against him. There was no other conclusion possible upon this record. Disciplinary proceedings are not instituted for the purpose of collecting debts owing by an attorney to his client, but for the purpose of inquiring into the professional conduct of the attorney and to determine whether said attorney is a fit person to continue in the exercise of the responsible and honorable office of attorney and counselor at law. The payment, while the procedure is pending, of moneys claimed in no way condones the offense charged and under investigation. The respondent having confessedly converted to his own use moneys of his client specifically intrusted to him for a definite purpose and thus having violated the fundamental principle governing the relation of attorney and client has demonstrated his unfitness and should no longer be permitted to continue the practice of the law.

He is, therefore, disbarred.

LAUGHLIN, DOWLING, SMITH and PAGE, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

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In the Matter of SOL. L. YOUNGENTOB, an Attorney,  
Respondent.

First Department, February 1, 1918.

**Attorney at law — suspension from practice — unlawful refusal to return letters to client — misappropriation of money due to counsel.**

Attorney at law suspended from practice for refusing to return to a client letters upon which he had no lien or claim, and for failure to pay counsel engaged by him, and for the appropriation to his own use of the money due such counsel.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Jabish Holmes* of counsel [*Thomas M. Healy* with him on the brief; *Einar Chrystie*, attorney], for the petitioner.

*Robert H. Elder*, for the respondent.

CLARKE, P. J.:

Respondent was admitted to practice as an attorney and counselor at law in March, 1900, at a term of the Appellate Division, Second Department, and has since practiced in the First Judicial District. The petition contained two specifications of unprofessional conduct charged against the respondent. (a) That in March, 1916, one Martha E. Grant consulted the respondent concerning domestic difficulties she was having with her husband, who, at the time, was living in Iowa. As Mrs. Grant had no grounds for a divorce and although respondent knew this he nevertheless advised that she should sue for a divorce representing that he could obtain one for her and fifteen dollars a week alimony; that relying upon the respondent's advice and representations Mrs. Grant paid him the sum of sixty dollars, it being understood that his fee for obtaining the divorce was to be one hundred and fifty dollars and that the balance thereof was to be paid from the allowance which her husband might be induced to give her; that about a month after paying the respondent the sixty dollars, Mrs. Grant decided that she would not institute any proceedings against her husband and so advised the respondent, who, up to that time, had done nothing in the matter, except to write two letters to Mr. Grant making demands upon him for the support of his wife and child and threatening legal proceedings unless he did support them. At this time she asked the respondent to return to her the sixty dollars less a reasonable fee for what he had already done in the matter, and also for the return of certain letters from her husband which she had intrusted to the respondent, but the respondent refused to return any part of the money to her and although he had no lien upon the letters in question, he refused to return them to her, unless she would execute in his favor a general release. This Mrs. Grant refused to do; whereupon the respondent demanded more money from her and threatened to sue her unless she paid it. To date the respondent has not returned the letters or any part of the money paid to him as aforesaid.

The learned official referee has reported that he found no misconduct in making the agreement and retainer and receiving the sixty dollars; that it was the privilege of Mrs. Grant

to discontinue the employment; that it was clear at that time that she was not indebted to him and that he had no lien on the letters she had deposited with him. He proceeds as follows: "The respondent did not at the time he refused to give up the letters claim any lien. Before the grievance committee of the petitioner he said: 'Q. You don't mean that you wanted a receipt for the letters. You mean that you wanted her to give a release? A. Well, a receipt covering everything. Q. Releasing you from all claims? A. From all claims. Q. That is a release. Don't call it a receipt. She offered to give you a receipt for the letters. A. She offered — Q. That you refused. A. That I refused to do. Q. You insisted on holding the letters unless she gave you a release? A. Yes. Q. And you claim that that is all right? A. I claim — I said to her, rather than cut the thing in two — if there was going to be any dispute, I wanted to settle the thing at this time. Q. The letters belonged to her? A. Correct, and I was willing to return — Q. And she paid you all that you were entitled to? A. Correct. Q. You had no lien upon the letters. They were her property, and she was demanding it from you? A. She was demanding money from me also. Q. Suppose she did. Did not the letters belong to her? A. The letters belonged to her. Q. Did you have any lien on them? There was nothing due you. You could not have a lien on them; there was nothing due you? A. No, except this; I will tell you frankly I did not take the trouble of ascertaining whether or not she had reconciled. Q. What difference does that make? A. None at all, except that I did not want any further trouble. I said 'If we're going to have a dispute about this thing' — Q. Didn't you realize it would have been less trouble if you had given the letters to her? A. If she hadn't abused me, and if she hadn't walked into the office as she did without waiting until I was disengaged, she would have gotten those letters from me.'"

In this proceeding he testified as follows: "Q. Did you tell her that you claimed a lien on the papers, or you were entitled to hold them? A. I told her that I could, claiming that she still owed me ninety dollars; and I told her that I could claim to keep those papers; and I stood ready and willing to return them and even release her of the obligation

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that she still owed me on the balance of the payment in order to straighten the matter out and have no further dispute about it. Q. Now, did you claim before the Bar Association that you had a lien on these papers? A. Why yes, I explained — I explained at the time to the Bar Association, and they differed with me. \* \* \* Q. Now, when she came and asked you to give back a certain portion of the fee, and demanded her letters, you refused to do it unless she gave you a release, didn't you? A. Not exactly a release. I drew up a paper, and the substance of that paper was that I wanted her to sign a paper that she received from me those letters, and I wanted — because she — Q. [Interposing] What was she to release, — to release you from what? A. From further obligations with reference to my services in her behalf, and that she relieved me — she relieved me. \* \* \* Q. Now, at the time you asked her to sign that paper she did not owe you any money, did she? A. Why yes. Yes, I regarded she still owed me ninety dollars, according to my arrangements with her."

It is quite clear from all the testimony in the matter that at the time Mrs. Grant demanded the return of the letters the respondent was utterly unjustified in refusing that demand. There could be no lien for she had admittedly paid him in full all that he demanded up to that time. He did not couple the refusal to deliver with any demand for any further sum at that time and his subsequent claim upon the hearing before the referee in direct contradiction of his claim when examined before the grievance committee is obviously an afterthought for the purpose of justification by way of a claimed lien and we agree with the conclusions of the learned official referee that the retention of the letters in the circumstances was violative of the standards prevailing in the legal profession and of the rule of conduct which the Supreme Court requires of the members of the bar.

(b) The substance of the allegations contained in this specification is that in March, 1914, the respondent was the attorney of record for the plaintiff in two cases against the Nassau Electric Railway Company and that he engaged Frederick Fishel, a member of the New York bar, to act as counsel in said cases; that one of the cases came on for trial, Mr. Fishel selected the jury and opened the case, when both

cases were settled for \$2,000, and that on May 12, 1914, this amount was paid to the respondent, and thereafter the actions were discontinued and the respondent received \$1,000 for his fee; that Mr. Fishel made several demands on the respondent for his share of the fee, but the respondent failed to comply therewith and appropriated the money due Mr. Fishel to his own use.

The main contention of the respondent, by way of explanation and defense, is that the agreement with Mr. Fishel was that the latter was to receive twenty per cent as his share of the fees, whereas he has always claimed twenty-five per cent. It appearing that after the settlement of the cases the respondent passed Mr. Fishel in the corridor of the court house and said to him: "As soon as I get the money, why, I will see you." Two or three weeks passed and Mr. Fishel not having heard from the respondent concerning his compensation, endeavored to get in touch with the respondent but was unsuccessful, and he thereupon examined the judgment record and learned that the judgment had been satisfied. Under date of May 27, 1914, respondent wrote Mr. Fishel as follows:

"I have been unable up to the present time to adjust your end of the Kaiserauer matter due to actual engagements in matters of importance.

"It is necessary, which will take a little time, to go over the disbursements incurred so that I could give myself credit when making allowances, which I will try to do between now and the early part of next week."

Not having received his compensation, Mr. Fishel sued the respondent and recovered a judgment by default for the sum of \$214. Thereafter the respondent made a motion to open the default and the motion was granted under terms, which the respondent did not comply with. The respondent was examined in supplementary proceedings in an effort to recover upon that judgment. At that time he testified that he had no property of any kind except a balance of \$1.60 in one bank and a balance of less than \$5 in another bank, and that no one held any property in trust for him. Respondent claims that he has always been ready, able and willing to pay Fishel twenty per cent of the net fees received by him, to wit, \$110. Before the grievance committee he testified that he had given money over to his sister so that \$110 was held by her in

trust for Mr. Fishel. Before the referee in this proceeding he testified that he apparently misunderstood the questions of the members of the committee and did not intend to so testify; that although he did not have the money personally with which to pay Mr. Fishel the \$110 he admits was due, he had made arrangements with his sister, who had money in the bank, to let him have that amount at any time Mr. Fishel would accept it. It is impossible to reconcile his testimony before the grievance committee with that upon the reference. His sister, Mrs. Wolper, who at the time was in the employment of the respondent as a stenographer and typewriter at a salary of \$12 a week testified as follows: "He was telling me about this money that he wanted to give to Mr. Fishel and he asked me if he could arrange with me at any time to pay the amount that he — that Mr. Fishel was entitled to — \$110. I said, 'Yes, any time Mr. Fishel wants the \$110 I can give it to you.'"

The learned official referee concludes as follows: "I do not consider these transactions as of much significance, for the reason that in my opinion, if we assume the respondent did exactly what he claims he did and Mrs. Wolper was able to make good, it does not constitute an adequate explanation of his conduct in the premises toward Mr. Fishel. It was the duty of the respondent within a few days, at the most, to inform Mr. Fishel of his receipt of the money and to tender at least the \$110 he conceded to be due. On the contrary he left Mr. Fishel to learn of the settlement from the records of the court, and even after his letter to Mr. Fishel he did not act promptly and squarely in endeavoring to effect a settlement but appropriated the entire fund to his personal use."

The respondent's own testimony produced a most unfavorable effect upon this court. It was shifty, evasive and lacking in candor. His conduct in both matters complained of as portrayed by himself shows that he is deficient in the characteristics of straightforwardness, honor and sense of personal responsibility expected from a member in good standing of an honorable and dignified profession. There may have been a real dispute between him and his brother lawyer, whom he had engaged as counsel, as to the terms of the retainer, and his personal use, which he admits, of the entire

amount received as a fee was undoubtedly caused by his necessities, but the judgment fixed the amount due to his associate. His claim of always having on hand, in some way or other, enough to pay the amount, which he himself admitted was due, is too flimsy to receive acceptance by this court.

We are of the opinion that the respondent has been guilty of professional misconduct and that he should be suspended from practice for six months, with leave to apply for reinstatement at the expiration of that term upon proof of his compliance with the conditions to be incorporated in the order to be entered hereon.

SCOTT, SMITH, PAGE and SHEARN, JJ., concurred.

Respondent suspended for six months, with leave to apply for reinstatement at the expiration thereof as stated in opinion. Order to be settled on notice.

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In the Matter of MICHAEL O. RINI, an Attorney, Respondent.

First Department, February 1, 1918.

**Attorney at law — disbarment — conversion of money belonging to client.**

Attorney at law disbarred for converting to his own use money intrusted to him for a specific purpose.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*Manfred W. Ehrich* of counsel [*Einar Chrystie*, attorney], for the petitioner.

\_\_\_\_\_, for the respondent.

CLARKE, P. J.:

Respondent was admitted in April, 1907, to practice as an attorney and counselor at law at a term of the Appellate Division in the Second Department and has since practiced in the First Judicial District. In June, 1914, the respondent was retained by one Nicola Armato to represent his interests in connection with an attachment brought against him by one Peter Berta. Lina Armato, the wife of said Armato, claimed the attached property and obtained possession by giving a

bond executed by a surety company. In order that Lina Armato might procure this bond one Filippo Sabella gave the respondent \$300 to deposit as collateral with the surety company. Thereafter an action was commenced on said bond and a judgment recovered for the sum of \$1,097.07. In January, 1915, Sabella on behalf of the defendant Armato gave to the respondent a check for \$1,097.07 with which to pay the judgment. Respondent thereupon called upon the surety company and learned that it had applied the \$300 received by it as collateral towards the payment of the judgment and the respondent then gave the surety company for the balance remaining due on said judgment a check for \$795.22, out of the funds received by him from Sabella. The charge was that the difference between the amount received by Sabella and the amount paid to the surety company was converted by respondent to his own use.

The learned official referee has reported: "The testimony tendered by the petitioner in support of the allegation charging the respondent with converting the \$300 is conclusive of the truth of the charge. The explanation given by the respondent is evasive, thoroughly unsatisfactory and cannot be accepted as a sufficient defense."

A supplemental petition containing further charges was filed by the petitioner pending the proceeding and was referred to the same official referee. In the second specification of the supplemental petition respondent was charged with misconduct as follows:

"In May, 1915, Donato Maro gave to the respondent \$640 to be disbursed as follows: \$140 to pay for the passage of Maro's sister from Italy to the United States and the remaining \$500 to be deposited as security for an immigrant's bond, which the respondent was to procure so that Maro's sister might be permitted to enter the country. The money was paid upon the understanding that when the bond was cancelled, the \$500 less the respondent's fees and disbursements was to be returned to Maro. Respondent had no occasion to use any of the money for the purpose for which it had been given him as Maro's sister died before respondent had arranged for her passage to this country. Instead of



returning this money to Maro respondent converted it to his own use. Maro and his wife have made repeated demands upon the respondent for the return of the \$640 but they have only succeeded in recovering from the respondent the sum of \$230 which amount has been paid in installments."

The learned official referee has reported as follows:

"The respondent has filed no answer to the specifications set forth in the supplemental petition, and has not appeared before me to contradict the testimony offered in proof of the above charge, although several adjournments were allowed him for that purpose. The testimony tendered in support of the charges set forth in the original petition and in the second specification of the supplemental petition establishes so clearly the respondent's guilt of the grossest misconduct as an attorney at law, that I directed the petitioner not to put in any proof in support of the charges set forth in the first and third specifications of the supplemental petition."

Upon examination of the testimony and of the exhibits we find that they fully sustain the conclusions of the learned official referee and we approve of the same. The evidence shows that respondent should no longer be permitted to exercise the rights and privileges of a member of a profession whose duties and obligations he has so flagrantly violated.

The professional conduct of this respondent was before this court in *Matter of Papa v. Rini* (171 App. Div. 796; *affd.*, 219 N. Y. 575). That was a summary proceeding to compel the respondent to pay over a sum of money received by him from a client in his professional capacity and wrongfully retained by him, and this court said: "In the case at bar the money was received by the attorney from his client for a specific purpose. It was not used for that purpose but retained improperly by the attorney. The giving of a worthless check and note instead of relieving the attorney from the control of the court by summary proceeding was an aggravation of the offense." And we affirmed an order compelling him to pay over.

The respondent should be disbarred.

SCOTT, SMITH, PAGE and SHEARN, JJ., concurred.

Respondent disbarred. Order to be settled on notice.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.  
BRIDGET PARIS, Respondent.

Second Department, January 18, 1918.

**Constitutional law — statute authorizing establishment of police districts and election of police justices within towns.**

Chapter 583 of the Laws of 1909, as amended by chapter 294 of the Law of 1910, being an act to authorize the several towns in the county of Suffolk to establish police districts outside the limits of any incorporated village therein, and to elect within such districts by ballot one police justice, three commissioners and to provide for police patrolmen within said districts, is unconstitutional.

A town or village may be divided for police protection but not for a separate court, since such portion cannot be thus dissevered from the rest of a municipality for judicial purposes.

APPEAL by the plaintiff, The People of the State of New York, from an order of the County Court of Suffolk county, entered in the office of the clerk of said county on the 11th day of September, 1917, reversing a judgment of the police justice in the town of East Hampton, L. I., rendered August 1, 1917, convicting the defendant of a misdemeanor.

The learned County Court held unconstitutional "An act to authorize the several towns in the county of Suffolk to establish police districts outside the limits of any incorporated village therein, and to elect within such districts by ballot one police justice, three commissioners, and to provide for police patrolmen within said districts." (Laws of 1909, chap. 583, as amd. by Laws of 1910, chap. 294.) The town board of East Hampton, under this statute, upon petition of not less than twenty-five of the taxable inhabitants of said district, gave notice of an election of such district (under section 3), which resulted in the vote to establish such a district within said town, which district in area was less than that of the whole town. There was no incorporated village in the town of East Hampton. By section 7 of the act "The police justice as provided for in this act shall be elected by the qualified voters in said district for the term of three years." By section 14 such justice "shall have the same powers conferred upon police justices within incorporated villages."

*Samuel Seabury* [*Ralph C. Greene, District Attorney, John deR. Storey and Raymond Smith* with him on the brief], for the appellant.

*Percy L. Housel*, for the respondent.

PUTNAM, J.:

The magistrate claiming here to try and convict this defendant, was the police justice of a police district in the town of East Hampton, L. I. Such justice has acted in this part of East Hampton without question for several years. If his jurisdiction be confined to the police district in which he was chosen it was unconstitutional. A town or village might be divided for police protection, but not for a separate court, since such portion cannot be thus dissevered from the rest of the municipality for judicial purposes. (*People ex rel. Townsend v. Porter*, 90 N. Y. 68.) If in order to sustain this Police Court jurisdiction we regard it as running beyond the confines of the police district and extending throughout all of East Hampton, then the principles of self-government have been violated. A fraction of the town would be erecting a local court over the rest of the inhabitants, who, having local justices of the peace provided by the Constitution (Art. 6, § 17), neither by direct vote nor by delegated power have ever consented to such additional tribunal.

The order of the County Court of Suffolk county reversing defendant's conviction for a misdemeanor before the acting police magistrate is, therefore, affirmed.

JENKS, P. J., THOMAS, MILLS and RICH, JJ., concurred.

Order of the County Court of Suffolk county reversing defendant's conviction for a misdemeanor before the acting police magistrate affirmed.

GENERAL BAKING COMPANY, Respondent, v. HORATIO N.  
DANIELL, Appellant.

Fourth Department, January 9, 1918.

**Trial — place of trial — rule as to residence of railroad companies not applicable to other domestic corporations — change of place of trial.**

The rule that railroad companies are deemed to reside in each of the counties through which their roads run, within the meaning of section 984 of the Code of Civil Procedure relating to the place of trial of an action, does not apply to other domestic corporations having a principal office as fixed in their certificates of incorporation, and branch offices in other counties where they transact a part of their business.

Motion to change place of trial to county where defendant resides granted upon the ground that neither the plaintiff corporation nor defendant resided in the county where the venue was laid at the time of the commencement of the action.

APPEAL by the defendant, Horatio N. Daniell, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 2d day of November, 1917, denying defendant's motion to change the place of trial herein.

*Frederick E. Hawkes*, for the appellant.

*Wilbur B. Grandison* [*Horton & Grandison*, attorneys], for the respondent.

FOOTE, J.:

We are of opinion that the rule that railroad companies are deemed to reside in each of the counties through which their roads run, within the meaning of section 984 of the Code of Civil Procedure, as to the place of trial of an action, does not apply to other domestic corporations such as the plaintiff, having a principal office as fixed in its certificate of incorporation and branch offices in other counties where it transacts a part of its business.

The distinction in this respect between railroad companies and other domestic corporations was clearly pointed out in the opinion of Presiding Justice PARKER in *Poland v. United Traction Company* (88 App. Div. 281), and this opinion was

adopted by the Court of Appeals in affirming the order in that case (177 N. Y. 557), thereby, as we think, intending to approve the distinction so pointed out.

As neither plaintiff nor defendant resided in Erie county at the commencement of the action, the motion to change the place of trial to Tioga county, the place of residence of the defendant, should have been granted.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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DOW VROMAN and ABRAHAM WEIL, Individually and as Members of and Constituting the Board of Elections for Niagara County, New York, Respondents, v. NORMAN D. FISH, County Judge of Niagara County, Defendant, Impleaded with THOMAS T. FEELEY and BURT A. DUQUETTE, County Clerk and District Attorney, Respectively, of Niagara County, Appellants.

Fourth Department, January 9, 1918.

**Constitutional law — chapter 202 of the Laws of 1917 amending Election Law in relation to commissioner of elections of county of Niagara — purpose of provision of Constitution that no private or local bill shall embrace more than one subject — essential contents of title of bill — general or special city law, what constitutes — who may attack constitutionality of statute.**

Chapter 202 of the Laws of 1917, entitled "An act to amend the Election Law, in relation to commissioner of elections in the county of Niagara," is not unconstitutional upon the ground that it violates section 16 of article 3 or section 2 of article 12 of the Constitution.

The purpose of section 16 of article 3 of the Constitution, providing that "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title," was to prevent concealing in the body of a local statute a foreign subject not germane to that mentioned in the title and so unrelated thereto as to cause surprise upon its discovery.

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Fourth Department, January, 1918.

If the title of a local law expresses a general purpose or object all matters fairly and reasonably connected therewith and all measures which will or may facilitate the accomplishment of such purpose or object are properly incorporated into the act and are germane to the title.

It is not necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill. It is sufficient if the title expresses its general purpose.

Chapter 202 of the Laws of 1917 concerns the whole State as regards its general elections, and the county of Niagara in particular. Its operation and effect upon the three cities in said county is incidental only and does not affect the municipalities as such. Hence, it does not violate section 2 of article 12 of the Constitution upon the ground that it relates to the property, affairs or government of the cities in said county and was not after its passage by the Legislature submitted to the mayor and common council of said cities as "special city laws" are required to be submitted.

Even if said statute does violate section 18 of article 3 of the Constitution, which prohibits the Legislature from passing a "private or local bill \* \* \* designating places of voting," this is not a question in which members of the board of elections for Niagara county are interested or which they are entitled to have decided, as the invalidity thereof would not enable them to continue to hold their offices. This, because said part of the statute is not essential to the operation of the other portions thereof and if pronounced invalid the remainder will not fall with it.

APPEAL by the defendants, Thomas T. Feeley and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Niagara on the 1st day of October, 1917, upon the decision of the court after a trial before the court without a jury.

The judgment decreed that chapter 202 of the Laws of 1917, entitled "An act to amend the Election Law, in relation to commissioner of elections in the county of Niagara," was unconstitutional and void and enjoined and restrained the defendants from appointing a commissioner of elections, or doing any act or thing pursuant to said statute.

The appellants further give notice of an intention to bring up for review an order entered in said clerk's office on the 2d day of June, 1917, continuing the injunction herein and also to review the original injunction order granted on the 23d day of April, 1917.

A. A. Bradley [Bradley, Merritt & Bradley, attorneys], for the appellants.

Alfred W. Gray, for the respondents.

FOOTE, J.:

At the time this action was begun plaintiffs were the duly appointed and acting members of the board of elections for Niagara county.

They bring this action to enjoin the defendants from proceeding to appoint a commissioner of elections for said county, as chapter 202 of the Laws of 1917 directs them to do, on the ground that that statute violates the State Constitution and is wholly void. The case was submitted at Special Term upon the pleadings and the stipulation of defendants' counsel that said act was not submitted to the three cities in Niagara county as a special city law, and the judge found that the act violates section 16 of article 3 of the Constitution which is "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title," in that the act is local, embraces more than one subject, and that the subject is not expressed in the title. He also found that the act violates section 2 of article 12 of the Constitution because it relates to the property, affairs or government of the cities of Niagara Falls, North Tonawanda and Lockport in said county, and was not, after its passage by the Legislature, submitted to the mayor and common council of each of those cities as "special city laws" are required by that section to be submitted. Upon these findings judgment has been entered adjudging the act unconstitutional and void and perpetually enjoining the defendants from appointing a commissioner of elections or doing any act thereunder.

An examination of this act in the light of the judicial decisions giving construction to these constitutional provisions requires us to hold, as I think, that the act is valid and does not violate either.

The act is entitled, "An act to amend the Election Law, in relation to commissioner of elections in the county of Niagara." It amends chapter 22 of the Laws of 1909, being the "Election Law" (Consol. Laws, chap. 17), by inserting therein a new article to be article 7-b. It creates the office of commissioner of elections in that county and confers upon such commissioner all the rights, powers and duties theretofore vested in any other officer or officers of the county or

of any of its political subdivisions relating to elections, with certain exceptions as to local and special elections held at other times than a general election. It provides that the commissioner shall be appointed within five days after the act takes effect by the county judge, county clerk and district attorney of the county, or a majority of them, who are respectively the defendants in this action. These officers are also to fill vacancies and appoint successors upon the expiration of the five-year term of office of the commissioner. These county officers have no other powers or duties under the act. Upon the appointment and qualification of the first commissioner, the board of elections is abolished. It provides that article 7 of the Election Law, which relates to boards of elections, shall not apply to the county of Niagara, except section 199, relating to police aid. In general it vests in the commissioner all the powers and duties prescribed by article 7 of the Election Law for boards of elections, and, in addition, confers upon him the powers theretofore exercised by other officers or boards of the county to appoint, upon the recommendation of the chairmen of the county committees of the two principal political parties, inspectors of election, poll clerks and ballot clerks; also the power to purchase voting machines when authorized by the local authorities; he is to fix the polling places for each primary district and the polling places for registration and election in each election district, and to create, alter or divide the various political subdivisions of the county into election districts in the manner provided in sections 296 and 419 of the Election Law.\* The act provides that the said new article shall not apply to elections held in cities, towns or villages where the elections are held at a time other than the time of general elections. There are other provisions defining the powers and duties of the commissioner, not necessary to be stated for an understanding of the scope and purpose of the act.

Plaintiffs' principal contention is that the act being local embraces more than one subject, or that the subject is not sufficiently expressed in the title. In support of this con-

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\* Amd. by Laws of 1916, chap. 537. See, also, Laws of 1917, chap. 703, amdg. § 296. — [R&P.]



tention it is pointed out that the act: 1. Abolishes the board of elections. 2. Creates a commissioner of elections. 3. Takes from the three cities of the county: (a) The appointment of election officers. (b) The right to divide their territory into election districts. (c) The right to fix their own polling places. (d) The custody of their voting machines and other election paraphernalia. 4. Vests all these rights in the election commissioner. 5. Takes from the board of supervisors the power of apportioning between the various municipalities of the county the election expenses and gives this power to the election commissioner.

Plaintiffs say that each is a separate subject. If this be so, and the act is local, then it would require five separate statutes to enact them into law. They could not be combined into one act even if all the so-called separate subjects were named in the title. This would go beyond the intent of the Constitution and is too narrow an interpretation of its meaning. Its object is to prevent concealing in the body of a local statute a foreign subject not germane to that mentioned in the title and so unrelated thereto as to cause surprise upon its discovery; a subject which appears out of place in the act and as if placed there without being mentioned in the title to mislead or deceive those who might be interested to oppose its adoption. This act is not of that character. The powers and duties it confers upon the commissioner of elections and takes from other local officers are such as it might reasonably be expected a commissioner of elections should have and such as are proper and needful to the orderly and efficient regulation of the conduct of the elections. It deals with only one subject, namely, a commissioner of elections for Niagara county in connection with the Election Law.

It has been held many times that the object of this constitutional requirement is that legislators and the public may be informed by the title of the general nature of local laws proposed to be enacted and to prevent deception. (*Economic Power & Construction Co. v. City of Buffalo*, 195 N. Y. 286, and cases cited and reviewed in the opinion of Judge CHASE.)

It is also settled that if the title of a local law expresses a general purpose or object, all matters fairly and reasonably

connected therewith and all measures which will or may facilitate the accomplishment of such purpose or object are properly incorporated into the act and are germane to the title. (*Astor v. Arcade R. Co.*, 113 N. Y. 93; *People ex rel. Village of Brockport v. Sutphin*, 166 id. 163; *People ex rel. Devery v. Coler*, 173 id. 103.)

It is not necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill. It is sufficient if the title expresses its general purpose. (*People ex rel. Corscadden v. Howe*, 177 N. Y. 499; *People ex rel. Davies v. Commissioners of Taxes of N. Y.*, 47 id. 501; *Wrought Iron Bridge Co. v. Town of Attica*, 119 id. 204.)

In *Devlin v. Mayor* (63 N. Y. 8) it was said: "The title need not be an abstract of the act, disclose its details, or declare the machinery or modes of procedure by which the act is to be carried into effect and its object accomplished. The subject of an act is that concerning which it is enacted. \* \* \* If the title of an act fairly and reasonably discloses what the legislation concerns, or the matter with which it deals, and indicates its purpose, the constitutional requirement is complied with."

The title of this act is not misleading or deceptive. It indicates that the Legislature was dealing with the subject of a commissioner of elections, which was notice in itself that such commissioner would be vested with adequate powers such as the Legislature might consider appropriate. The title sufficiently advises all persons interested in the conduct of elections in that county of the general subject dealt with. The details of the act are not separate subjects since they are germane to the general subject of the powers and duties of the commissioner of elections. There are many authorities to this effect, some of which I cite: *People ex rel. Devery v. Coler* (*supra*); *People ex rel. Village of Brockport v. Sutphin* (*supra*); *People ex rel. Gere v. Whitlock* (92 N. Y. 191); *Kerrigan v. Force* (68 id. 381); *People ex rel. Dee v. Backus* (11 App. Div. 147; *affd.*, 153 N. Y. 686).

The Election Law which this act amends is a general law. As originally enacted by chapter 22 of the Laws of 1909, it provided (Arts. 7-11) for a board of elections in cities of the first class containing one or more counties (the city of New

York), and for a single commissioner of elections in each of the counties of Erie, Monroe, Onondaga and Westchester. It vested in the individual commissioners respectively of the counties named powers and duties similar in some respects to those of this Niagara county act.

Thus the office of commissioner of elections is not a new office and we must assume that the practice of administering the Election Law by means of a single commissioner in different counties was well understood by the Legislature and the people and that the words "commissioner of elections" used in the title of the bill would be understood and were not likely to mislead or deceive as to the nature of the bill.

The learned justice at Special Term (100 Misc. Rep. 613) cites the cases of *People ex rel. Corscadden v. Howe* (177 N. Y. 499); *Cahill v. Hogan* (180 id. 309) and *Economic Power & Construction Co. v. City of Buffalo* (195 id. 286) as authorities requiring or justifying the condemnation of this act. But the acts condemned in those cases had titles which were held to be misleading and deceptive, as was pointed out by Judge POUND in his opinion in *Willis v. City of Rochester* (219 N. Y. 427), and he distinguished those cases by saying: "The title here [the *Willis* case] complained of does not attempt to specify in what particulars the charter is to be amended, and it does not thus divert attention from a foreign purpose concealed in the bill and not germane to the expressed purpose," citing the *Corscadden* and the *Cahill* cases.

As to the *Economic Power Company* case, he said that the act there in question "was held to have a title delusive, deceptive and misleading."

We think the act in question here is not, as already stated, open to the objection that it is deceptive or misleading.

The learned justice at Special Term also decided in his findings that the act in question is one relating to the property, affairs or government of the cities of Niagara Falls, North Tonawanda and Lockport, and as it was not submitted to the mayor and common council of each of those cities in compliance with the provisions of section 2 of article 12 of the Constitution it violates the prohibition of that section and for that reason is void. He did not, however, consider that

question in his opinion, nor does the learned counsel for the respondents cite any authority upon the question.

We are of opinion that the act in question is neither a general nor a special city law within the meaning of this constitutional provision. It is a law which concerns the whole State as regards its general elections and the county of Niagara in particular. Its operation and effect upon the three cities in that county is incidental only and does not affect the municipalities as such. Its effect is rather upon the voters resident in those cities. It does not even affect the local elections in those cities held at other times than a general election, and it does not touch the government, property or affairs of those cities as cities.

The learned counsel for the respondents seeks to support the decision below upon the further ground that the act violates section 18 of article 3 of the Constitution which prohibits the Legislature from passing a "private or local bill \* \* \* designating places of voting." No such ground of invalidity is alleged in the complaint, nor did the court below make any finding upon that subject, nor was any such finding requested.

If the act does violate this section, still we think it is not a question in which the plaintiffs are interested or which they are entitled to have decided. That part of the act is not essential to the operation of the other portions of the act, and if pronounced invalid, the remainder of the act would not fall with it. (*People ex rel. Dee v. Backus*, 11 App. Div. 147; *affd.*, 153 N. Y. 686; *People ex rel. City of Rochester v. Briggs*, 50 *id.* 553.)

"Before a law can be attacked by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement of his rights." (6 Ruling Case Law, 89, § 87, and cases there cited.) Hence, as the whole act would not be defeated and as the invalidity of this part of the act would not enable plaintiffs to continue to hold their offices, they are not entitled to ask the courts to decide that question. (*Stewart v. Kansas City*, 239 U. S. 14.)

We are thus led to the conclusion that the judgment below is erroneous and that the plaintiffs are not entitled to any

relief in this action, without considering the question, which was discussed in the opinion below and is elaborately argued here, as to whether an action in equity will lie for the relief which the plaintiffs seek, since, as is claimed, they have an adequate remedy at law.

The judgment of the Special Term should be reversed and the complaint dismissed, with costs.

All concurred.

Judgment reversed and complaint dismissed, with costs.

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HANNAH GOLDSMITH, Respondent, v. ROSE HASKELL and BERTHA LAMPERT, Appellants, Impleaded with HARRY M. GOLDSMITH and Others, Defendants.

First Department, February 15, 1918.

**Will — construction — unlawful suspension of power of alienation for period of years — vesting of fee in heirs as tenants in common.**

The will of a testator, survived by his widow and three daughters, provided that the widow should receive a certain annuity during life in lieu of dower, and that the residue of the income be divided equally between his three children, and that in the event of the death of "either" of them "their share to go to the children surviving, if they have no issue, the share to go to my own children surviving or to their surviving children, to be shared equally between them." It was further provided that his estate "shall not be divided until 25 years from date of will, providing my wife Clara is not living." He further directed "that if any of my said children shall die childless her share of the estate shall be equally divided between my surviving children, or their respective heirs." Provisions of the will examined, and

*Held*, that the only provision with respect to the disposition of the income of the estate is during the life of the wife of the testator;

That other provisions by which the testator attempted to suspend the division of his estate for the period of twenty-five years unlawfully suspended the power of alienation, and are invalid;

That the fee vested absolutely in the three daughters as tenants in common at the death of the widow.

APPEAL by the defendants, Rose Haskell and another, from an interlocutory judgment of the Supreme Court in favor

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of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of February, 1917, upon the decision of the court after a trial at the New York Special Term.

An appeal is taken from said judgment except in so far as it adjudges that the real property in suit is so circumstanced that a partition thereof cannot be made without great prejudice to the owners and that defendant Harry M. Goldsmith has no estate in said property.

*Samuel A. Telsey*, for the appellants.

*William J. Leitch*, for the respondent.

LAUGHLIN, J.:

The action is for the partition of premises in the borough of Manhattan, New York, of which Nathan May died seized in fee simple absolute on the 2d day of November, 1900, leaving a last will and testament executed on the 7th day of December, 1898, and leaving him surviving a widow who died in the month of October, 1915, prior to the commencement of the action, and three daughters, the plaintiff and the appellants. He appointed his wife and the plaintiff executrices, but the will contained no *express* devise to them in trust or otherwise. The will is most inartificially drawn and it does not disclose with any degree of definiteness or certainty the disposition the testator intended to make of his property with the exception of the income during the life of his widow. In the 1st paragraph following the usual preliminary statement the testator states that *after* his lawful debts are paid he appoints said executrices. He then authorizes them to sell any real or personal property or to mortgage or to buy real estate "if they think, it would benefit the estate." He next states that his wife is to receive an annuity of \$1,500 during life in lieu of dower, and that the residue of the income is to be divided equally between his three children, and that in the event of the death of "either" of them "their share to go to the children surviving, if they have no issue, the share to go to my own children surviving or to their surviving children, to be shared equally between them." After providing for the appointment of another daughter to act as executrix in the

event of the death of his wife he directs that his estate "shall not be divided until 25 years from date of will, providing my wife Clara is not living." Immediately following this provision he directs that upon the death of his wife "the executrices settle the estate within (6) six months." This provision is followed by a paragraph the 1st sentence of which is as follows: "I further direct that if any of my said children shall die childless her share of the estate shall be equally divided between my surviving children, or their respective heirs;" and the will closes with a provision appointing his executrices, who had been appointed in the 1st paragraph, over again.

At the time the will was made the plaintiff was married and had one child. She now has three, all infants, and they are defendants. They answered by their special guardian who represented them on the trial but have not appeared on the appeal. The appellants have no issue. The complaint stated the material facts and alleged that the infant defendants may have some interest in the property, and a copy of the will was annexed thereto. The answer interposed by the special guardian was in the usual form submitting the rights and interests of the infants to the protection of the court. The learned court construed the will as giving each of the three children of the testator an undivided one-third part of the premises for life, and held that each of them took an undivided one-third in fee defeasible upon her death without issue, and that in the event that any of the three daughters of the testator shall die leaving issue such issue shall take an undivided third in fee simple absolute, and in the event of the death of any of them without issue the surviving sisters or sister and the issue of any deceased sister shall take the third, of which such deceased child had the life use, in fee simple absolute. We are unable to agree with that construction of the will. Under the settled law of this jurisdiction the attempt of the testator to suspend the power of alienation of his property for twenty-five years from the date of the will was invalid. The will contains no provision clearly indicating that the testator intended to create a trust for that period for the benefit of his children, but it is immaterial whether he so intended or not, for since it was not limited

upon two lives in being such a trust would be invalid. (*McGuire v. McGuire*, 80 App. Div. 63; *Walter v. Walter*, 60 Misc. Rep. 383; *affd.*, 133 App. Div. 893; *affd.*, 197 N. Y. 606.) The will contains no provision disposing of the *corpus* of the estate unless it be the final provision that if any of his children shall die childless her share of the estate shall be equally divided between his surviving children or their respective heirs; and unless that provision be construed as relating to the death of a daughter during his lifetime the will does not purport to make any disposition of the fee between the time of the death of the testator and the death of his children respectively. Such a construction would leave the fee vested in his heirs subject to the life estates and subject to be divested under the provisions of the will which were to take effect in that event only upon the death of his children respectively. In the view we take of the case, however, it is unnecessary to decide whether it was competent for the testator to leave the fee simple vested in his heirs subject to being so divested under the provisions of the will, for in any event we are of opinion that the fee vested absolutely in the three daughters upon the death of the widow, if not before. It is immaterial to a decision of the issues herein whether the children took the fee as heirs or whether they took it under the will or whether the will should be construed as devising the property to the executrices in trust during the lifetime of the widow, or as merely creating a charge upon the estate in her favor for the annuity, for in any event there could be here no valid trust or suspension of the power of alienation beyond the life of the widow. Upon her death in any event the estate became vested absolutely in the three daughters of the testator all of whom were then living and any of their issue then born or that may thereafter be born take no interest. Of course, the testator could have devised one-third of the realty in trust for the use of each of his children during life disposing of the remainder upon her death; but the only provision of the will with respect to the disposition of the income of the property is during the life of the wife of the testator, and as already observed the other provisions of the will by which the testator attempted to suspend the division



of his estate for the period of twenty-five years from the date of the will provided his wife was not then living, are invalid. The further provision which is the only one that can possibly relate to the fee attempts merely to dispose of the fee in the event that any of his daughters shall die childless, but he has not attempted to dispose of the fee in the event that any of his daughters shall die leaving issue nor has he provided that each of the daughters shall continue to receive income during their respective lives and after the death of their mother. We are of opinion, therefore, that at the time the action was brought the fee had vested absolutely in the three daughters as tenants in common.

The provisions of the findings, conclusions of law and judgment inconsistent with these views are, therefore, reversed, with costs to appellants, and appropriate findings, conclusions and provisions of the judgment in accordance with these views should be contained in the order to be entered on our decision which shall particularly specify the findings which are reversed.

SCOTT, DOWLING, SMITH and DAVIS, JJ., concurred.

Judgment reversed, with costs to appellants. Order to be settled on notice.

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DOROTHY A. MASON, Respondent, v. JOHN I. D. BRISTOL, Defendant, Impleaded with FRANK G. BUTLER, as Executor, etc., of THOMAS A. BUTLER, Deceased, Appellant.

First Department, February 15, 1918.

**Decedent's estate — action upon an alleged written assignment by testator to plaintiff — parol evidence insufficient to establish said assignment.**

Plaintiff alleged that the testator, a former life insurance agent, duly assigned and transferred to her by an instrument in writing all premiums due and to become due to him on certain insurance policies, but was unable to produce the writing and sought to prove the same by parol evidence. Evidence examined, and *held*, insufficient to establish a cause of action, and that the complaint should be dismissed.

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APPEAL by the defendant, Frank G. Butler, as executor, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of January, 1917, upon the decision of the court after a trial at the New York Special Term.

*Robert A. Kutschbock* of counsel [*Albert B. Quencer*, attorney], for the appellant.

*James W. Osborne* of counsel [*Nathan B. Chadsey*, attorney], for the respondent.

LAUGHLIN, J.:

The appellant's testator died on the 19th day of March, 1916, leaving a last will and testament executed on the 13th day of March, 1916, which has been duly admitted to probate. The testator was the agent for the Northwestern Mutual Life Insurance Company and solicited certain insurance policies for it upon which he became entitled to a share in the renewal premiums and half annual and quarterly premiums.

The plaintiff alleged that on the 21st of February, 1916, the testator for a valuable consideration duly assigned and transferred to her by an instrument in writing, which he delivered to her, all of said premiums due and to become due to him from the defendant Bristol as the general agent in the county of New York of said company; that he gave due notice of such assignment to the defendant Bristol as did the plaintiff also and that she demanded payment of said premiums; that the appellant has also demanded payment thereof, claiming that they belong to the estate, and that the said premiums will continue for a period of about nine years and will aggregate about \$4,000. Judgment for the amount of premiums now due and that plaintiff is entitled to those to become due is demanded.

The defendant Bristol appeared but interposed no defense. He paid the amount of premiums due prior to the trial into court and his counsel asked that it be adjudged who is entitled thereto and to the unpaid premiums.

The plaintiff was unable to produce any assignment and undertook to prove the assignment under which she claims by parol evidence. She testified that she received the assign-

ment at the apartment of the testator, No. 158 West Twentieth street, borough of Manhattan, New York, on the 21st day of February, 1916, and that it was in his handwriting and signed by him. On her cross-examination by counsel for appellant she testified that the testator delivered the assignment to her at that time, and no objection was interposed to her testifying to the personal transactions between her and the testator with respect thereto. She said that she last saw the assignment at the apartment of the testator on the evening of February twenty-fourth, at which time she claims to have delivered it to Mr. Quencer, the attorney for the appellant, to keep for her. She stated the contents of the assignment from memory as follows:

" 158 WEST 20TH STREET,  
" NEW YORK CITY, *February 21st, 1916.*

" To John I. D. Bristol, manager of the Northwestern Mutual Life Insurance Company. By request of my late wife, Carrie Butler, I give to my sister-in-law, Dorothy Mason, all my renewals as well as quarter and half-annual premiums in the Northwestern Mutual Life Insurance Company.

" (Signed) 'THOMAS BUTLER.'"

She also testified that on the day the assignment was delivered to her by the testator she accompanied him to the office of the insurance company and that he took the assignment to Mr. Hering, who was the office manager for Mr. Bristol, but later on she admitted that she did not accompany the testator into the office and did not see it so exhibited. She also says that she took it the same day to Mr. Merrill, an attorney, who was called as a witness by the plaintiff and testified that she showed him a paper some time in the month of February, that year, and that he thought he read it but not very thoroughly and could not give the contents, and could not testify to what it was but that he thought, and was very sure, that it was an assignment and that he gave her some advice about it. Plaintiff testified that she then went to the residence of her brother, Mr. Agan, in New Jersey and showed the assignment to him and to his wife, and the same day called on a friend, Mrs. Blanckencie, where she remained all night and showed her the assignment. Her brother was

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not called but his wife testified that plaintiff showed her the assignment; that she knew the handwriting of the testator and that the body of the assignment and the signature were in his handwriting, and she assumed to give the contents substantially the same as did the plaintiff. The testimony of Mrs. Blanckencie is to the same effect. It appears that Mr. Quencer had had business relations with and was counsel for the testator. The plaintiff further testified that on the twenty-fourth of February she called on Mr. Quencer at his office and showed him the assignment; that he examined it and said that the signature thereto was that of the testator; and that she told him that the testator had made two papers, "a will to his brother and sister," Fred and Fannie, "and a paper to me," and that she delivered both papers to him, and informed him that she received the will from the testator, and that she thought, but was not sure, that the will, which was in the handwriting of the testator, was not signed, and that she left both papers with him. The testimony of the plaintiff does not otherwise disclose the purpose of her call on Mr. Quencer or for what purpose she left the papers with him, and she denied that she consulted him with respect to the validity of the will or requested him to prepare a valid will or to call on the testator or informed him that the testator was seriously ill, although she admits that she said that he had a cold and she admits that he said he would come to the testator's apartment that evening. Mr. Quencer, called by appellant, testified that plaintiff called on him and asked him to examine a will which she showed him, and to advise her with respect to its validity; that it was in the handwriting of the testator and signed by him, but not witnessed and that he advised her that it was not properly executed; that she showed him no assignment and only exhibited the one paper to him, and that in the 3d clause of the will as drawn by the testator he gave to the plaintiff his renewal premiums in the Northwestern Mutual Life Insurance Company; that the plaintiff then asked him to draw a will in proper form and to call at the testator's apartment as he was very ill; that he was unable to go then but promised to go that evening; and that she left the will as prepared by the testator and from it he prepared a will in proper form to the same effect,

and called on the testator that night taking with him the will as previously prepared by the testator and the draft of the will which he had prepared.

There is a serious conflict in the testimony with respect to what occurred that evening after Mr. Quencer called at the apartment of the testator. The testator and his brother Frederick and the plaintiff were there and the appellant, who resided in Philadelphia, came about the time Mr. Quencer arrived. The testimony of the plaintiff is to the effect that she, unobserved by the others, asked Mr. Quencer for her assignment, referring to it, however, as her *paper*, and that he gave it to her and that she put it in her shirt waist; that she then in the hearing of the others asked him for her *papers* which she had left with him that afternoon and that in response to this inquiry he delivered to her the will prepared by the testator; that she then stepped into the hallway and was followed by Frederick, and she ran out into the street and he followed her; that she, evidently inferring that he saw the second paper delivered to her and wanted it, left the *will* on a barrel and that he picked it up but continued to follow her; that she ran into a restaurant and put the assignment in her stocking and was ordered out of the restaurant and after leaving she asked for protection and a stranger accompanied her back to the apartment of the testator whereupon Frank Butler stated that unless she gave up the paper he would call an officer and said that it was "no good," and that she, after stating that she desired to keep it as a matter of sentiment and to show that the testator "meant what was right," delivered the paper, which she says was the assignment, to Mr. Quencer with the request that he keep it for her and that he took it and put it in his pocket, and that she had not seen it since. She does not claim that it had been referred to as an assignment on that occasion and it is to be inferred even from her own testimony that the others, including the testator, understood it to be the will, and the two brothers and Quencer so testified. Quencer consistently maintained that he did not have any assignment or bring it with him or deliver it to the plaintiff on that occasion but he conceded that at her request he did deliver to her the will prepared by the testator, and his testimony and that of the two brothers of the testator

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is to the effect that the controversy was over and the discussion was concerning that will which the testator declared was invalid owing to the fact that it was not properly executed; and Frederick Butler denied that he saw plaintiff leave any paper on a barrel or that he picked up a paper as she claimed. Their testimony also indicates that the testator was incensed over the fact that the plaintiff attempted to take and retain possession of the will, and that Quencer immediately delivered to the testator the paper which the plaintiff delivered to him. The appellant further testified that the next morning the testator exhibited to him the paper which the plaintiff had so delivered to Quencer the evening before and, in effect, asked his advice as to what should be done with it and that he read it and advised the testator that as it had no value it might as well be destroyed, and that the testator then tore it up. He says that the contents of that paper were the same as stated by Quencer. The plaintiff and her sister-in-law, who had assumed to give the contents of the assignment, testified with respect to an interview between plaintiff and Quencer over the telephone. The sister-in-law fixed the time as the morning after Quencer had so called on the testator. She did not know Quencer's voice then but claimed to be able to identify it on hearing it some time later. They both say that the telephone was so manipulated that they both heard the conversation; that the plaintiff requested Quencer to redeliver to her the paper she delivered to him at the testator's apartment, and that at first he denied that she delivered any paper to him and then asked her if she did not remember that she told him to give it to the testator and finally said that he must have destroyed it, but admitted that he knew the contents of it "substantially." Quencer denied this alleged telephonic interview. On the 14th of July, 1916, some four months after the death of the testator, plaintiff wrote Quencer requesting the return of the paper that had been taken from her by violence on the evening to which reference has been made. He replied next day stating that it was not in his possession and that he had not seen it since that night when he returned it to her and that the papers of the testator were presumably in the possession of the executor. It is significant that in this letter to Quencer the plaintiff did not

refer to the paper as an *assignment* but merely as the *paper* which had been forcibly taken from her. The plaintiff also wrote the executor on the 18th of July, 1916, demanding the return of the paper which she claimed had been taken from her by duress on said occasion, which paper, she stated in her letter to the executor, gave her the renewal premiums in question; but it is likewise significant with respect to that letter that it did not state whether the paper was an assignment or a will, and it is conceded by the appellant that the will prepared by the testator did contain a provision giving the plaintiff those renewal premiums. The plaintiff also testified with respect to an interview with Mr. Hering, who represented Bristol, at which she claims he admitted that the testator had been there with an assignment but that he did not recollect whether it was in typewriting or handwriting, and that he had advised the testator that if he gave it away that plaintiff could collect the renewals. Mr. Hering testified that he never saw any assignment to the plaintiff and that he so told her when she called on him but that he did recollect and informed her that the testator exhibited an unexecuted, typewritten assignment of the renewals to a sister in England, and that he advised the testator that if he signed that assignment, whether he delivered it or not, the company would not pay the premiums to him. The plaintiff admitted that on the 28th of March, 1916, nine days after the testator's death, she wrote the appellant in reply to a letter from him evidently answering a request on her part for twenty dollars, stating that he could pay her that amount or more "in part payment" of her *legacy* and that in view of the fact that there would be some delay in probating the will she requested that he let her have fifty dollars on account of her legacy. In answer to an inquiry by the court as to why when she claimed the money under an assignment she asked for a payment on account of the legacy she replied that she thought if she asked for it under the assignment he would not give her anything, and that her attorney advised her "the will had nothing to do with the assignment." She did not, however, call her attorney to corroborate her with respect to this. When the testator made his will, some three weeks after the evening Quencer called, instead of leaving all his interest in the renewal premiums

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of said company to plaintiff, he only left her a legacy of two hundred dollars payable from them as already stated.

We are of opinion that the plaintiff did not establish a cause of action by a fair preponderance of the evidence and that the evidence satisfactorily shows that there was no written assignment of these premiums by the testator to the plaintiff. The only disinterested testimony tending to sustain the plaintiff is that of Mr. Merrill who was strongly of the impression that the paper the plaintiff exhibited to him was an assignment, but he had no definite recollection with respect to the contents of the paper and did not even remember whether it was signed. It may well be that the paper to which Mr. Merrill and the other witnesses referred as an assignment was the will in the handwriting of the testator which did contain a paragraph giving her these renewal premiums, and not having been executed in the form of a will very likely it had the appearance of an assignment. She does not say when or for what purpose she obtained the will from the testator. In our opinion the testimony of Mr. Quencer is, in the circumstances, highly probable and should be accepted. It does not appear that he had any interest in the matter at the time the plaintiff called on him and the only possible interest he could have had when he testified is as attorney for the appellant. His testimony is irreconcilable with the plaintiff's theory. It is highly probable that the plaintiff called on Mr. Quencer, as he states, to ascertain whether or not the will prepared by the testator giving her these renewal premiums was validly executed and that on being advised that it was not she requested him to prepare a will in proper form to the same effect. His call at the testator's apartment that night can only be accounted for on that theory. It is evident that in the meantime something had occurred which led the plaintiff to believe that the testator would not, in the presence of his two brothers, execute the will which she had requested Mr. Quencer to prepare and bring there for execution and that she deemed it to her interest to retain possession of the will in the handwriting of and signed by the testator which accounts for the controversy on that occasion. If she had an assignment there was no reason for leaving it with Quencer at his office or delivering it up to him at the testator's apartment and



it is not probable that she would have done so, at least not without protesting that it was an assignment which the testator had voluntarily made and delivered to her. Moreover, if as the plaintiff now claims, there had been a formal written assignment to her of these premiums and also a will, both of which were the subject of the controversy on the occasion when Quencer called at the testator's apartment, it is probable that in writing the executor she would have described the paper, the possession of which she demanded, as the assignment, or in some manner have distinguished it from the will, whereas both letters are entirely consistent with there having been only one paper, namely, the will containing a provision giving her these renewal premiums. Furthermore, the plaintiff's request for part of the legacy under the will is wholly inconsistent with the existence of an assignment giving her the entire amount of the same fund.

We are of opinion, therefore, that the court erred in determining the facts and that the findings and legal conclusions inconsistent with these views should be reversed and appropriate findings and conclusions in accordance with our views made and embodied in the decision to be entered on the appeal which should specify by numbers the findings and conclusions that are reversed, and that the judgment should be reversed, with costs, and the complaint dismissed, with costs.

SCOTT, DOWLING, SMITH and DAVIS, JJ., concurred.

Judgment reversed, with costs, and complaint dismissed, with costs. Order to be settled on notice.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
FRANK REILLY, Appellant.

First Department, February 15, 1918.

**Crime — assault — reversible error — admissibility of statements to district attorney by defendant induced by promise that they would not be used against him on the trial.**

Upon the prosecution of a defendant for an alleged assault with a loaded pistol, it is reversible error to permit his examination by the prosecuting attorney over his objection and exception as to prior statements made by

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him in answer to questions by said attorney after being assured by the prison chaplain that anything he said would not be used against him, where such statements materially contradicted his testimony as given on the trial, and tend directly to connect him with the crime.

APPEAL by the defendant, Frank Reilly, from a judgment of the Court of General Sessions of the Peace in and for the County of New York, Part V, rendered against him on the 22d day of December, 1916, convicting him of the crime of assault in the second degree.

*Edward J. White* of counsel [*Lewis Stuyvesant Chanler*, attorney], for the appellant.

*Don Carlos Buell* of counsel [*Edward Swann*, District Attorney], for the respondent.

LAUGHLIN, J.:

The indictment contains two counts for assault, one in the first and the other in the second degree, both charging the defendant with an assault upon one Tynan with a loaded pistol. The assault occurred in the early morning of September 23, 1915, at the Manhattan Casino at a picnic given under the auspices of a political association. The evidence is uncontroverted that there were discharged one or more firearms in the barroom on that occasion and that Tynan was shot three times, and that immediately thereafter Police Officer Dapping, who with other officers was hurrying from the dance hall into the barroom where the first shots were fired, was shot and killed by one Bambrick, who was subsequently tried, convicted and electrocuted therefor. The defendant and one Schuman and others had been indicted and convicted in New Jersey on a charge of having in their possession in an automobile in that State a concealed weapon, and their conviction had been affirmed on appeal. The defendant had induced a friend of his to become bondsman for himself, Schuman and others, and about a week prior to the shooting had surrendered Schuman. This, it appears, embittered Schuman and he threatened the life of the defendant and intimated that it might be taken by others. There is evidence also of an attempt on the part of some of Schuman's friends, after he was so surrendered, to shoot the defendant prior to

the shooting affair in question. Tynan was a friend of Schuman. The evidence tends to show that the defendant was aware of this and that he and Tynan had some words when they met at the Casino shortly before the shooting, and that there were many friends of Tynan and Schuman and of the defendant at the picnic, and that one Quinn, a former police officer, who overheard conversations indicating that trouble was brewing, undertook to allay it and requested Tynan and his friends to bury the hatchet and to meet and shake hands and have a drink together, and induced the defendant to enter the barroom for that purpose. As they were about to have the drink the shooting took place. Tynan claims that after some words passed between him and the defendant he was shot three times, and although he did not see the revolver in the hands of the defendant he saw the flashes of the discharge, indicating that it was in his hands. No other witness testified to seeing the defendant fire the shots, but several witnesses testified that they saw the revolver in his hand immediately after they heard the reports, and Quinn says that immediately after he heard the shots he took the revolver from the defendant and threw it on the floor. A fully loaded revolver was subsequently found on the floor in the vicinity of the shooting. There is other evidence that the defendant, when outside the building while endeavoring to escape after the shooting, had a revolver and with it threatened an officer who was endeavoring to arrest Bambrick. The defendant took the witness stand in his own behalf and testified that he had no revolver on that occasion, and that as he turned around he saw Tynan pointing a pistol at him and immediately grappled with him and wrested the pistol from him and threw it on the floor, and that he could not see whether it was discharged during the struggle. The testimony of the defendant was in substance the same as a statement he made to the officer who arrested him some months after the shooting. The evidence is ample to sustain the conviction, and we would unhesitatingly approve the finding of the jury were it not for an error committed on the trial which cannot be overlooked without encouraging the commission of like errors on the trial of criminal causes.

It appears that after the arrest of the defendant on this

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indictment, Father Cashin, the chaplain at Sing Sing, called at the office of the district attorney with a view to obtaining evidence to assist Bambrick, who had been convicted, in an application for executive clemency, and the defendant was brought to the district attorney's office and, in the presence of Father Cashin, was interrogated by Assistant District Attorney Dooling. After he had been asked some questions, the assistant district attorney said to him, "Nobody wants to embarrass you, Reilly; you are free to say anything you choose. I am not going to urge you to say a word. It is for you to say whether you will help or not." To this statement of the assistant district attorney the defendant responded, "I have nothing to say." Father Cashin thereupon asked Mr. Dooling if he might speak to the defendant, and Mr. Dooling assented. Father Cashin then addressing the defendant said, "In my experience of four and a half years I have had many experiences with the District Attorney's office and I have always found them to be eminently fair, particularly during the present administration — there is no danger of any statement you may make now being used against you. We only desire to help you." The defendant was then asked by Mr. Dooling whether he preferred to wait the arrival of his counsel who had been summoned, and he answered, "I prefer to go right on." It further appears that the district attorney at some stage of the interview before the examination proceeded, but the precise order is not given, also asked the defendant, "Do you feel that you are willing to answer any questions that I may put to you, or do you feel that might prejudice you?" and the defendant answered, "I have nothing to prejudice me. I am willing to answer any questions I can." Counsel for the defendant appeared during the interview, and the proceedings before his arrival, which had been taken down in shorthand, were read to him, including the statement made to the defendant by Father Cashin, and his counsel made no objection and the examination continued. At the outset of the cross-examination of the defendant on the trial he was asked whether he made a statement of the shooting as it occurred that night when he was arrested and brought before the chaplain from Sing Sing and some of the assistants in the office of the district attorney at the time Bambrick was

asking for executive clemency, and he answered in the affirmative. Objection was duly interposed by counsel for defendant to his being interrogated concerning that statement. The court directed that the jury retire, and the competency of the cross-examination with respect to the statement was discussed between the court and counsel. The assistant district attorney had the statement, which was typewritten and evidently quite lengthy, for during the subsequent examination of the defendant concerning it reference was made to pages, and there is one reference to page 18. Counsel for the defendant did not predicate his objection on the ground that the statement constituted a confession, and he expressed the opinion that it was not a confession, although he declined to take the responsibility of making that as an admission. The court was of the opinion that the statement did not constitute a confession and that, therefore, it was competent for the assistant district attorney to interrogate the defendant concerning admissions contained therein which tended materially to contradict his testimony given on direct examination. The jury returned, and the assistant district attorney proceeded to interrogate the defendant, reading the questions and answers from the typewritten statement and asking the defendant whether he was asked the questions and made the answers. He was not asked concerning the entire statement, and none of it was formally introduced in evidence. It is to be inferred that he claimed in that statement, as he testified on the trial, that Tynan had the revolver and that he wrested it from him. The assistant district attorney read from page 18 of the statement four questions and answers, as follows: "Q. Did it go off at all? A. There was shots fired and I could not tell where they went. The first shot went through me just like that (indicating in a diagonal direction). Q. You mean while you were struggling with this man for the possession of the gun it went off? A. Yes, I got it with that hand and it went off. Q. Did it hit anybody? A. I don't know. Q. Did you see anybody fall? A. No sir; I was too excited." He then asked the defendant whether he was asked those questions and made those answers, and the defendant answered, "I don't remember." He was then asked whether his memory was better at the time of the

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trial than it was at the time he made the statement, and he answered that it was. He further said in answer to a question by the assistant district attorney that he did not know whether he made those answers or not, but that if he did they were not true. He was asked why he made them if they were not true, and he answered that he did not remember making them; and when further pressed as to why he made the statements if they were not true, he said that he did not know what he was talking about at that time, but that he did not tell the district attorney and Father Cashin that he did not know what he was talking about. He further testified that after he was asked a few questions Mr. Dooling stated that he was not telling the truth, and that then he protested and said no more "until after Father Cashin" gave him a "guarantee that anything" that he said "would not be used against" him at his trial, and that he then said he did not care whether he talked or not. He further said that he was confused owing to the fact that he was interrogated by Mr. Dooling, Father Cashin, by another lawyer and by a detective. That the assistant district attorney regarded the conflict between the statement and the testimony given by the defendant as very material is shown by his lengthy cross-examination of the defendant concerning it. We are of opinion that this examination of the defendant, which was had over his objection and exception, was incompetent. Assistant District Attorney Dooling, in effect, adopted the statement of the chaplain, and the legal effect thereof is precisely the same as if the statement had been made by the assistant district attorney. There was, therefore, in view of the statement and of the testimony of the defendant, which extends it somewhat, a clear representation made to him to induce him to talk that anything he said would not be used against him on the trial of the indictment under which he was then in custody. The statements shown by the formal typewritten statement to have been made by the defendant materially contradict his testimony as given on the trial, for they indicated that the revolver was discharged during the struggle, and to that extent corroborated the complaining witness that he was shot by a revolver held by the defendant. Of course, the statement was not a complete confession of the crime with which

the defendant was charged, but it contained material admissions against him which tended directly to connect him with the crime. We do not understand that the competency of statements obtained from a defendant in custody under indictment by coercion or promises or other inducements depends on whether or not the statements constitute a complete confession of the crime with which the accused was charged within the provisions of section 395 of the Code of Criminal Procedure. We think the Court of Appeals in *People v. Kennedy* (159 N. Y. 346) intended to make it clear that statements so obtained cannot be used in any manner against the accused. The court there promulgated the rule for the guidance of prosecuting officers, as follows: "In passing it may be proper to observe that, when officers charged with the enforcement of the law, through undue zeal or an inordinate desire to obtain evidence to convict, by covert threats, doubtful and uncertain promises, acts of intimidation or other questionable means, procure incriminating statements from persons subsequently charged with crime, they are inadmissible, as they would be regarded as involuntary and not made without inducement or practical compulsion. The reception in evidence of statements thus obtained might well be a ground for reversal. Therefore, district attorneys and other executive and administrative officers should remember that to be admissible statements made by one charged with or suspected of crime must be voluntary, fairly obtained, and not procured by inquisitorial compulsion or other improper means. When properly procured they may be of value and employed as evidence against the person making them, but if procured otherwise they are not admissible, and a judgment influenced by such evidence would require reversal." Under those rules, the rights of the defendant were violated to his prejudice.

It follows, therefore, that the judgment should be reversed and a new trial ordered.

SCOTT, DOWLING, SMITH and DAVIS, JJ., concurred.

Judgment reversed and new trial ordered. Order to be settled on notice.

**KARCZAG PUBLISHING Co., INC., Respondent, v. SHUBERT THEATRICAL COMPANY and Others, Appellants.**

First Department, February 15, 1918.

**Contracts — action for breach of contract for production of musical play — contract construed — alleged violation of rights of publication — parties — “person with whom or in whose name a contract is made.”**

In an action for the breach of a contract for the production of a musical play, originally written in German, because of alleged violation of plaintiff's reserved right of publication of songs and lyrics extracted from the play, it appeared that said rights were reserved to the plaintiff subject to the qualification “but this applies only to numbers belonging to the Karczag Publishing Co., and to no other songs or interpolations.” The contract further provided as follows: “The party of the second part further agrees that it will not make any more alterations, cuts or additions in its English version of the said play than appear to it or the producer necessary or desirable for the success of the said play, and in case the Karczag Publishing Company does not furnish interpolations satisfactory to it or the producer, or does not deliver such as may at such times prior to the production, be requested by the second party, then the party of the second part may make interpolations of any songs as may be necessary in its judgment, and to obtain such songs, musical numbers or interpolations elsewhere.”

*Held*, that the meaning of the above provision was that the party of the second part, the Shubert Company, or its producer, was to be the sole judge of what alterations, cuts or additions were necessary, and were bound to accept only such interpolations as it or he found satisfactory. Said provision of the contract cannot be construed as limiting the Shubert Company in obtaining satisfactory interpolations so that it could seek them elsewhere only after the plaintiff had been requested to furnish them and had refused or had furnished unsatisfactory ones.

Since the Shubert Company retained the publishing rights of the interpolations, which it obtained elsewhere, and since it is only regarding these numbers that plaintiff complains, it has no cause of action.

The plaintiff being a mere agent of the party of the first part to the contract, and its only interest in collections made thereunder being the stipulated percentage which it is entitled to retain, it is not “a person with whom or in whose name a contract is made for the benefit of another” within the meaning of section 449 of the Code of Civil Procedure, so as to render it competent to sue.

**APPEAL** by the defendants, Shubert Theatrical Company and others, from an order of the Supreme Court, made at  
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the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of July, 1917, overruling their demurrer to the amended complaint.

*Charles H. Tuttle* of counsel [*William Klein* with him on the brief; *William Klein*, attorney], for the appellants.

*M. L. Malevinsky* of counsel [*Dennis F. O'Brien* with him on the brief; *O'Brien, Malevinsky & Driscoll*, attorneys], for the respondent.

SCOTT, J.:

This action is for the recovery of damages for breach of a contract for the production of a musical play, the particular breach charged being an alleged violation of plaintiff's reserved right of publication. The plaintiff founds its claim to the so-called publishing rights upon three documents which are annexed to and form a part of the complaint. The first document, denominated Exhibit A, is a contract between one Wilhelm Karczag, of Vienna, Austria, described as "Wiener Verlag," of the first part and Felix and Hugo Meyer, of New York, of the second part. By this contract the Messrs. Meyer undertake to organize in New York a corporation to be known as the "Karczag Publishing Company \* \* \* for the purpose of exploiting in the United States of North America, Canada, Mexico and Cuba the rights for the sale and publication as per this agreement with the Wiener Verlag." The Messrs. Meyer also agreed "to transfer the rights and duties set forth in this contract to the Karczag Publishing Company to be founded, and guarantee that said corporation shall immediately after the formation enter into the present contract." On its part the Wiener Verlag agrees "to give to this Karczag Publishing Company the entire selling rights and publishing rights of all works already appearing in their publishing business, or to be published in the future for the territory mentioned in paragraph one, without any further expenses." Exception is made of works which the Wiener Verlag may acquire, but as to which they do not acquire selling or publishing rights in the territory mentioned. As to them the Wiener Verlag agrees to pay to the Karczag Publishing Company one-half of whatever it may realize from another American agent. The contract contains somewhat

specific agreements as to how the business of the Karczag Company is to be carried on. The Karczag Company is to retain from all collections of royalties or any other sources derived from theatrical productions ten per cent and the Wiener Verlag agrees to pay to said company ten per cent of all collections made directly by it derived from royalties, etc., of productions in the United States, Canada and Cuba. The Karczag Company is to make payment to the Wiener Verlag for the music and stage publishing parts in accordance with the customary amounts agreed between the Wiener Verlag and American publishing houses. At the end of each business year a balance is to be struck and of the net proceeds the Karczag Company and the Wiener Verlag are each to receive fifty per cent, but if the balance sheet shows a loss the Wiener Verlag is not to bear any part thereof, but the loss may be carried on to the next balance sheet.

The complaint alleges that, in pursuance of the foregoing contract, the Karczag Publishing Company, the plaintiff here, was organized and the Messrs. Meyer thereupon transferred to it all their right, title and interest in and to the above-mentioned contract, and that plaintiff now is the owner of "all rights, title and interest of any and every character created, established and conveyed by said contract."

The next document attached to the complaint and denominated "Exhibit B," is described as a power of attorney by which Wilhelm Karczag gives to plaintiff "the right to represent in the United States of North America, Canada and Mexico my publishing and theatrical business as well as the rights of authors and other parties represented through my publishing business," and authorizes said plaintiff "to make contract with authors, managers, publishers and any other parties, to receive moneys, to give receipts for such and to attend to all other legally binding matters."

The third document attached to the complaint, and denominated Exhibit C, is the contract which the defendants are accused of breaking. It is made between "W. Karczag of Vienna, Austria, whose representative in New York is the Karczag Publishing Co., Inc.," party of the first part, and the Shubert Theatrical Company, party of the second part. This contract provides for the production by the Shubert

Company of a certain musical play. The contract is quite specific in relation to what the defendant Shubert Company undertakes to do, and what royalties it undertakes to pay. With those matters we have no present concern, this action having to do only with alleged violations of that clause of the contract dealing with what are known as publishing rights, by which appear to be meant the right to publish songs and lyrics extracted from the play. These rights are reserved to plaintiff subject to the significant qualification "but this applies only to numbers belonging to the Karczag Publishing Co. and to no other songs or interpolations." To appreciate the significance of this qualification it is necessary to turn to an earlier part of the same clause, which reads as follows: "2. The party of the second part further agrees that it will not make any more alterations, cuts or additions in its English version of the said play than appear to it or the producer necessary or desirable for the success of the said play, and in case the Karczag Publishing Company does not furnish interpolations satisfactory to it or the producer, or does not deliver such as may at such times prior to the production, be requested by the second party, then the party of the second part may make interpolations of any songs as may be necessary in its judgment, and to obtain such songs, musical numbers or interpolations elsewhere." The crucial point in the case, apart from the question whether plaintiff may sue at all for breach of the contract, is as to the meaning of that portion of the contract last quoted, and as to when and under what circumstances the Shubert Company was entitled to make interpolations. The plaintiff's construction of the contract is that the Shubert Company had no right to make any interpolations until it had first called upon plaintiff to furnish such interpolations as were desired, and plaintiff had refused or had produced unsatisfactory interpolations. If this be the true construction the demurrer admits that the Shubert Company has violated the contract.

We do not think, however, that the contract, which is far from clear, will bear this construction. It is evident that the play was originally written in German and doubtless was adapted for production in Germany or Austria. Naturally to produce it in English upon the American stage would

necessitate some alterations to fit it for the atmosphere in which it was to be played. Accordingly, the first words of the clause from the contract above quoted give to the Shubert Company the widest latitude in making alterations, cuts and additions, limited only by its or the producers' idea of what is necessary or desirable for the success of the play. Interpolations of course are included under the terms "alterations" and "additions." Under certain circumstances the Shubert Company was authorized to "make interpolations of any songs as may be necessary in its judgment, and to obtain such songs, musical numbers or interpolations elsewhere" than from plaintiff. When may it so make interpolations? According to the contract (1) "in case the Karczag Publishing Company does not furnish interpolations satisfactory to it [the Shubert Company] or the producer," or (2) "does not deliver such as may at such times prior to the production, be requested by the second party."

Here appear to be two contingencies provided for separated by the disjunctive "or." The first contingency is that the plaintiff, without any request, fails to furnish satisfactory interpolations. Doubtless it was well understood by the plaintiff as by the Shubert Company that some alterations and interpolations would be necessary to fit the production for the American stage. Anticipating this the plaintiff when it delivered the words and music of the play might have delivered proposed interpolations for the consideration of the producer. Or the Shubert Company, finding some interpolations necessary, might have preferred, for the sake of artistic consistency, that the same hands that wrote the play and the music should also write the interpolations, and for that reason have requested plaintiff to furnish them. If these were the thoughts in the minds of the contracting parties it is easy to understand why the two contingencies were inserted. Upon any other theory it is not so easy to understand. But in any event the clear meaning of the clause was that the Shubert Company, or its producer, was to be the sole judge of what alterations, cuts or additions, were necessary, and were bound to accept only such interpolations as it or he found satisfactory. We do not think that the clause can reasonably be construed as limiting the Shubert

Company in obtaining satisfactory interpolations, so that it could seek them elsewhere only after the plaintiff had been requested to furnish them and had refused, or had furnished unsatisfactory ones.

This construction makes the contract at least intelligible and consistent. For the musical numbers which the Shubert Company obtained from W. Karczag or from plaintiff the publishing rights were reserved to the latter. For the interpolations which the Shubert Company obtained elsewhere it retained the publishing rights, and as it is only regarding these latter numbers that plaintiff complains it follows that it has no cause of action.

It is suggested in the complaint, somewhat vaguely, that whoever wrote the interpolations complained of borrowed from the original score and book of the play in question, but no damages are asked upon this score, and indeed it is conceded that whatever was done in this regard was so done as to avoid any prosecution for violation of copyright.

A further point is made by the appellants which seems to be serious. It is that the plaintiff has no standing to sue upon the contract, Exhibit C, because it was not a party to it, the party of the first part being W. Karczag of Vienna. From all of the documents attached to the complaint and hereinbefore summarized it is apparent that plaintiff is merely the agent in this country of Wilhelm Karczag; that whatever collections it makes are made for said Karczag, and that the only interest plaintiff has in such collections is the stipulated percentage it is entitled to retain, and fifty per cent of the profits at the end of the year, if there are any. The contract is made by Karczag and plaintiff is concededly not a party to it. It is not, therefore, "a person with whom or in whose name a contract is made for the benefit of another," and is not, therefore, competent to sue. (Code Civ. Proc. § 449.)

For these reasons the order appealed from must be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with costs.

LAUGHLIN, DOWLING, SMITH and DAVIS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs.

HAROLD H. HACKETT, Plaintiff, v. BELL OPERATING COMPANY, INC., Defendant.

First Department, February 15, 1918.

**Landlord and tenant — innkeepers — facts not establishing relation of innkeeper and guest so as to render former liable as such for property stolen.**

Where the plaintiff leased four rooms in a hotel from the defendant for a period of six months to be occupied solely as private living rooms and said rooms were so used, the relation between the parties was that of landlord and tenant, and not innkeeper and guest, and, hence, the plaintiff is not entitled to enforce the innkeeper's liability against the defendant and recover for certain tennis trophies stolen from his room during his absence by some person unknown either to him or the defendant.

An innkeeper's liability exists only in the case of one who is a traveler and seeks the hospitality of the inn as a transient guest.

LAUGHLIN, J., dissented.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*John Delahunty*, for the plaintiff.

*Arnold L. Davis* of counsel [*N. Raymond Heater* with him on the brief; *Parker, Davis & Wagner*, attorneys], for the defendant.

SMITH, J.:

The plaintiff occupied a suite of rooms in the Hotel Netherland, located at Fifth avenue and Fifty-ninth street in the borough of Manhattan. During his absence for two or three days from those rooms, certain tennis trophies that he had won in various tournaments were stolen from his room by some person unknown either to the plaintiff or defendant. The agreed value of these trophies is \$940. For that amount the plaintiff asks judgment against the defendant, which was operating said hotel, claiming liability therefor on account of the duty claimed to be owing to him as the defendant's guest. The defendant's answer to the claim is that the plaintiff was not defendant's guest but was its roomer or tenant to whom the defendant owed no other duty than that of reasonable care.

It is unnecessary to cite many authorities upon the question presented because the authorities have been so thoroughly collected and discussed in an able opinion written by Mr. Justice COCHRANE of the Third Judicial District in the case of *Crapo v. Rockwell* (48 Misc. Rep. 1). In that opinion it is made clear that an innkeeper's liability, which is sought here to be enforced, exists only in the case of one who is a traveler and seeks the hospitality of the inn as a transient guest. To those the innkeeper under the common law owed an extraordinary duty of protection, both of person and of property. The case of *Hancock v. Rand* (94 N. Y. 1) has probably gone further than any other case in giving a liberal construction of this liability to a traveler and a transient guest, but that case is so fully explained in the opinion of Mr. Justice COCHRANE that I can add nothing by further discussion here. The only question that remains is whether the facts of this case are such as to bring it within the rule of law there construed.

It seems that the plaintiff has a house in the city of New York at 326 West One Hundred and Eighth street, but this house he did not occupy, and pursuant to the facts as agreed between the plaintiff and the defendant: The "plaintiff occupied the premises therein referred to [to wit, the apartment specified] as his only New York City residence for the term therein mentioned." The agreement between the plaintiff and defendant is dated the 5th day of October, 1915. The apartment, consisting of four rooms, was rented for the term of six months from the 1st day of October, 1915, to the 1st day of April, 1916, "and not to exceed one year, to be occupied as private living apartments and for no other purpose whatever, at the weekly rental of \$90.00," pursuant to certain restrictions.

The first restriction is that the tenant shall pay "rent" as aforesaid as the same shall fall due.

The second is that the tenant shall not assign or underlet the lease or the demised premises without the written consent of the landlord.

The third is that the said rooms shall be used as residence and sleeping apartments, and for no other purpose whatever; that no cooking shall be done therein, nor shall any meals be served therein except by the landlord.

The fifth is that the tenant shall abide by and conform to any rules and regulations which the landlord shall deem essential or proper.

The sixth is that the landlord will, without charge, furnish such services as are usual and customary in the management and conduct of a first-class hotel and hotel business.

Under these facts it is difficult to perceive how the plaintiff can properly claim to be either a traveler or a transient guest. His occupation was for a definite term of six months which might be extended to a year if the plaintiff so chose. The contract clearly contemplates the relation of landlord and tenant and expressly so designates the parties thereto, and not the relation of innkeeper and guest. The property that was stolen was property that would not naturally be carried by a traveler or transient guest but is property that would naturally be kept in a permanent or temporary home or dwelling house. If the defendant be liable for these tennis trophies, it would also be liable for expensive oil paintings with which the plaintiff might decorate his room or for expensive rugs which he might lay upon his floors, property that would not under ordinary circumstances be brought into the apartment by a traveling guest. It would seem clear that under the facts in this case the relation between the plaintiff and defendant was that of tenant and landlord and not that of guest and innkeeper from which the extraordinary liability sought here to be enforced might arise.

I recommend judgment for the defendant, with costs.

SCOTT, DOWLING and DAVIS, JJ., concurred; LAUGHLIN, J., dissented.

Judgment ordered for defendant, with costs. Order to be settled on notice.



MILTON SCHNAIER, Appellant, v. BRADLEY CONTRACTING COMPANY, Respondent, Impleaded with THE CITY OF NEW YORK, Defendant.

First Department, February 15, 1918.

**Municipal corporations — contract between city and construction company construed — personal liability of contractor to abutting owner — right of abutting owner to sue upon said contract.**

Contract between a company engaged in constructing a subway and the city of New York construed, and *held*, to indicate an intention on the part of the contractor to become personally liable to an abutting owner for injury to his property;

That there was such privity between the city and the party to the contract and the abutting owner as to authorize the latter to sue upon the contract made in his behalf.

APPEAL by the plaintiff, Milton Schnaier, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of New York on the 15th day of June, 1917, upon a dismissal of the complaint at the opening by direction of the court.

*G. H. Brevillier* of counsel [*Thomas M. Healy* with him on the brief], for the appellant.

*Frederick L. C. Keating* [*Israel V. Werbin* with him on the brief], for the respondent.

*William L. Ransom* of counsel [*Howard A. Butler* with him on the brief], for the Public Service Commission for the First District.

SMITH, J.:

Plaintiff is the owner of an apartment house upon Lexington avenue at the corner of Ninety-fifth street. The defendant, the Bradley Contracting Company, was constructing the subway. In that construction, and without any allegation of negligence upon the part of the Bradley Contracting Company, the foundations of the plaintiff's apartment house were shaken and made insecure, and the building was otherwise damaged in the amount of \$12,000, for which sum the plaintiff

demands judgment against both the Bradley Contracting Company and the city of New York.

At the beginning of the trial the complaint was dismissed as to the city of New York. From the order dismissing the complaint no appeal has been taken. As the trial progressed, the complaint was also dismissed as against the Bradley Contracting Company and the parties stipulated to strike out all the evidence in the case and to raise that question by letting the case come to this court as upon the motion to dismiss the complaint as failing to state a cause of action.

Two questions are presented upon this appeal: *First*, upon the construction of the contract—whether it was intended simply as one to indemnify the city, or whether a contract liability to the property owner injured was intended to be assumed. *Secondly*, assuming that there was an intention to assume a direct liability to the abutter, whether the individual abutter injured is so far in privity with the city that he may bring the action against the contractor.

*First.* A fair construction of the provisions of the contract indicate to my mind an intention on the part of the contractor to become personally liable to the abutter for the injury done. Articles 45 and 47 are as follows:

“Article 45. The Contractor expressly admits and covenants to and with the City that the plans and specifications and other provisions of this contract, if the work be done without fault or negligence on the part of the Contractor, do not involve any danger to the foundations, walls or other parts of adjacent buildings or structures or to navigation; and the Contractor will at his own expense make good any damage that shall, in the course of construction, be done to any such foundations, walls or other parts of adjacent buildings or structures or to navigation. The liability of the Contractor under this covenant is absolute and is not dependent upon any question of negligence on his part, or on the part of his agents, servants or employees and the neglect of the Engineer to direct the Contractor to take any particular precautions or to refrain from doing any particular thing, shall not excuse the Contractor in case of any such damage. Where the work is required to be done by tunneling

the same admission and covenant shall also apply to the foundations, walls and other parts of buildings and to any railroad track or structure, subway, street, conduit, pipe, sewer or other structure or surface over the tunnel. \* \* \*

"Article 47. The Contractor shall be solely responsible for all physical injuries to persons or property occurring on account of and during the performance of the work hereunder, and shall indemnify and save harmless the City from liability upon any and all claims for damages on account of such injuries to persons or property, and from all costs and expenses in suits which may be brought against the City for such injuries to person or property; it being distinctly understood, stipulated and agreed that the Contractor shall be solely responsible and liable for and shall fully protect and indemnify the City against all claims for damages to person or property occasioned by or resulting from blasting or other methods or processes in the work of construction whether such damages be attributable to negligence of the Contractor or his employees or otherwise."

The covenant of the contractor that he would, at his own expense, make good any damage that should be done to any foundations, walls or other parts of adjacent buildings or structures, and the further covenant that the contractor would be solely responsible for all physical injuries to persons or property occurring on account of or during the performance of the work under the contract, whether or not caused by his negligence contained in article 45 of the contract, is a direct promise to pay to the injured abutter. This article contains no hint of a liability for indemnity. The promise to make good is a promise to pay. (*Creed v. Hartmann*, 29 N. Y. 591.) Article 47 repeats this obligation and adds thereto a covenant to indemnify the city for all such liabilities. It is clear that for some of these injuries the city would not be liable and the assumed responsibility therefor must, therefore, be direct to the abutter injured. A covenant merely to indemnify the city would be expressed in language more simple and to so construe these covenants would emasculate the covenants by taking therefrom obligations explicitly assumed and such obligations as the Court of Appeals has held the municipality is morally bound to impose upon a

contractor engaged in similar work. These covenants are clearly distinguishable from those construed in *Haefelin v. McDonald* (96 App. Div. 213).

*Second.* Assuming then a personal covenant to pay to the abutter, the question remains whether the abutter is so far in privity with the city that he may take advantage of the covenant made in his behalf.

In *Pond v. New Rochelle Water Co.* (183 N. Y. 330, 338) a water company, in consideration of the right to lay and maintain its water mains and pipes through the streets of an incorporated village for a series of years, entered into a contract with the village whereby it agreed to supply private consumers and corporations in the village with pure and wholesome water at a rate per annum not exceeding a designated sum. It was held that an action might be brought by an individual resident for a permanent injunction restraining the company from enforcing collection of a water rate in excess of that fixed by the contract. The court there refers to the case of *Lawrence v. Fox* (20 N. Y. 268) and to other cases considering contracts made by one in behalf of another, and then says: "The principle established by this case has been applied to contracts entered into by a father for the benefit of his daughter, and by a husband for the benefit of his wife. As to the latter instance, see *Buchanan v. Tilden* (158 N. Y. 109). In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of opinion that the complaint states a good cause of action."

In *Smyth v. City of New York* (203 N. Y. 106) the city had contracted with a contractor to build a subway, in which contract the contractor obligated himself to be responsible

for all damage which might be done to abutting property or buildings or structures thereon by the method in which the construction thereunder should be done, but not including in such damage any damage necessarily arising from proper construction pursuant to the contract or the reasonable use, occupation or obstruction of the streets thereby. It was held, *first*, that although the city might not be liable for the negligence of the contractor to whom the work had been let, and might not be liable on the ground that it suffered a nuisance to be maintained in the streets, nevertheless, that an abutter might bring an action directly against the contractor upon the covenant. Chief Judge CULLEN, in speaking for the court, says: "A still broader doctrine is held in the case of what may be termed public contracts. In *Little v. Banks* (85 N. Y. 258) it was said: 'Contractors with the State, who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance.' (Page 263.) In that case the defendant had a contract with the State officers to sell and deliver to the public volumes of the law reports, which he was about to publish, at certain specified prices, and upon failure to comply with that agreement he agreed to pay to any persons aggrieved the sum of \$100. It was held that the plaintiff, a person to whom the defendant had refused to deliver such reports, might maintain his action to recover the stipulated damages."

Several cases are referred to, among them the case of *Pond v. New Rochelle Water Company* (183 N. Y. 330), and Chief Judge CULLEN then says: "In principle the case cited and the one before us seem to be almost identical. There, as here, the first object of the contract was for the supply of a corporate, as distinguished from a governmental want; there it was supplying water for the hydrants, street and fire purposes; here the construction of a railroad. In the first case it was held that the village in its governmental character had sufficient interest in the welfare of its citizens and inhabitants to secure to each of them a supply of water at reasonable

rates. In the case before us it was well known and generally appreciated that for at least some very substantial part of the discomfort, damage and injury occasioned to the abutters by even the most careful and proper prosecution of the work, the abutter could not recover indemnity or compensation. It was also appreciated that in the prosecution of all great works, at times negligence and fault will occur, and that such fault will often be on the part of irresponsible parties from whom there would be small chance of recovering pecuniary redress. Therefore, though the city might not be liable for injuries occasioned by such negligence, it was entirely proper, if not morally obligatory upon the part of the rapid transit commissioners to secure the abutting owners from loss or damage occasioned by negligence and improper conduct of the work."

In *Rigney v. N. Y. C. & H. R. R. Co.* (217 N. Y. 31) it was held, where a contract between the city and the railroad company with reference to the construction of a railroad which involved a change of grade, contained a covenant on the part of the defendant that in the event of any damage resulting to any person or property from the work the defendant would pay and liquidate the same at its own expense, and assume the liability therefor, that this amounted to more than a covenant to indemnify the city; that it was in addition an assumption of liability for damages which might result to any person from carrying it out, and plaintiffs might recover upon the theory that the covenant or promise in the contract between the city and the railroad company to pay damages resulting from the change of grade was for their benefit within the doctrine of *Lawrence v. Fox*. In that case the *Pond* case and the *Smyth* case, before cited, were approved, and it was said: "The second element of liability, viz., some obligation or duty owing from the municipality to the owner of the abutting property, is also apparent. It exists in the fact that the city is under some obligation to protect its inhabitants, and when it enters into a contract for public work, which may result in damage to one of such inhabitants, for which otherwise he would be without remedy, the municipality may require the contractor to compensate the person injured."

Within these authorities it would seem clear that there was such privity between the city, the party to the contract,

and the abutter as would authorize the abutter to sue upon the contract made in his behalf. The case of *Newman v. Bradley Contracting Co.* (100 Misc. Rep. 1) is disapproved.

It follows that the judgment, so far as it dismisses the complaint against the Bradley Contracting Company, must be reversed and a new trial granted, with costs to appellant to abide the event.

SCOTT, LAUGHLIN, DOWLING and DAVIS, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee under the Will of CHARLES F. G. HEYE, Deceased, Respondent, Appellant, v. GEORGE G. HEYE and Others, Appellants, Respondents.

First Department, February 1, 1918.

**Decedent's estate — testamentary trust — apportionment of stocks of corporations subsidiary to Standard Oil Company between capital and income — apportionment of dividends between capital and income — apportionment of rights to subscribe for stock — properties purchased by accumulated profits before and after creation of trust — increase in value of stock not income — test by which to determine whether allotment of profits to income will impair capital — time when trust was created — time of declaration of dividends controls allotment thereof.**

Where a trustee under a will giving the income of the trust estate to life beneficiaries with remainders over at the expiration of the trust held stock of the Standard Oil Company of New Jersey and, when said company was judicially declared to be an illegal combination in restraint of trade, received from said combination on its dissolution the stocks of its constituent corporations, said stocks should be held as part of the *corpus* of the trust estate and should not be distributed to the life beneficiaries as income.

The above rule holds although the present value of the Standard Oil stock of New Jersey remaining in the trust estate after said distribution exceeds the value of all the stocks when the trust was created, for that fact affords no justification for disrupting the *corpus* of the trust.

In the apportionment of the stocks of the subsidiary companies between the *corpus* and income the *corpus* of the trust must be preserved for the benefit of the remaindermen.

In the case of an extraordinary dividend declared on stocks held as part of a trust estate it is the duty of the court to inquire what the sources are and to credit to capital account so much of the dividend as is derived from or constitutes a distribution of capital (including profits accrued before the creation of the trust) and to credit to the income account so much thereof as is derived from or constitutes a distribution of profits accruing during the lifetime of the trust.

Although the books of the corporation distributing the stocks of the constituent companies treat the distribution as one of reserved or accumulated profits, such statements are mere bookkeeping entries and do not affect the fact that the transaction was a redistribution of capital assets.

The capital of the Standard Oil Company of New Jersey was depleted by taking therefrom the assets of its subsidiary companies although after such deduction the book value of the oil company's shares was larger than when the testamentary trust was created.

Stocks of the subsidiary companies which at the time of the creation of the trust and prior to the testator's death were owned by the Standard Oil Company of New Jersey were properly apportioned to the capital of the trust estate, for the testator's ownership of a share of all of the assets of the Standard Oil Company of New Jersey carried with it a similar interest in the stock of the subsidiary companies and such interest cannot be severed and allotted to income without impairing the integrity of the *corpus* of the trust.

Where a subsidiary oil company whose stock was held by the Standard Oil Company of New Jersey prior to the creation of the trust, owned the stock of other subsidiary companies which it had purchased out of surplus earnings after the formation of the trust, the stock of said subsidiary companies which were distributed on the disintegration of the Standard Oil Company of New Jersey should be allotted to the capital of the trust.

But stock of subsidiary companies purchased by the Standard Oil Company of New Jersey with earnings accumulated after the formation of the trust should be allotted to the life beneficiaries, as it involves no impairment of the original *corpus* of the trust.

In determining whether a distribution of stocks acquired out of and representing surplus earnings after the formation of the trust, the basic inquiry is whether a distribution thereof to the life tenants would intrench upon the *corpus* of the original trust.

Distribution of extraordinary dividends made by subsidiary companies and by the Standard Oil Company of New Jersey after the disintegration of said company should be allotted to the life beneficiaries as well as dividends declared but not yet paid.

But the right of the trustee to subscribe for additional stock of the subsidiary companies at par should be allotted to the principal of the trust for the life tenants are not entitled to said subscription rights.

So, too, similar subscription rights should be allotted to the capital of the trust although the corporations offering said rights declared at the same



time a cash dividend and authorized subscribers to apply the same in payment for additional stock.

Rights to subscribe for stock at par offered to stockholders by constituent companies should not be treated as an extraordinary dividend and allotted to the income of the trust estate, for such subscription rights belong to the capital, otherwise the trustee's proportion of interest in the assets of the companies would be materially altered for the worse.

Where subsidiary oil companies whose stock was part of the trust estate formerly owned pipe lines and, in order to escape regulation by the Interstate Commerce Commission, had the pipe lines separately incorporated and took back the stock of said companies in return for the pipe line properties, and the stocks were then distributed among stockholders *pro rata*, said distribution was not a dividend to be allotted to life beneficiaries, but on the contrary was part of the original *corpus* of the trust.

In making calculations necessary for the apportionment of the dividends declared by the former subsidiary companies of the Standard Oil Company of New Jersey there are two dates to be determined: *First*, the date of the creation or establishment of the trust, and *second*, the date to be taken for the purpose of ascertaining whether the capital of the trust will be impaired by extraordinary dividends declared. The former date is not the date of the testator's death but the date when the trustee received the securities from the executrix. The second date is not that of the time of the distribution of the dividend but, on the contrary, is the date when the dividend was declared.

PAGE, J., dissented in part, with opinion; DOWLING, J., dissented, with opinion.

CROSS-APPEALS from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York upon the report of a referee, judicially settling the accounts of the plaintiff trustee and instructing it as to the disposition to be made of certain securities, extraordinary dividends and stock subscription rights.

*George L. Shearer* of counsel [*Stewart & Shearer*, attorneys], for the plaintiff, respondent, appellant.

*F. Kingsbury Curtis* of counsel [*Hugo Kohlmann* with him on the brief], for the defendants *George G. Heye* and *Marie Heye Clemens*, individually and as executors, etc., of *Marie Antoinette Heye*, deceased, appellants, respondents.

*Eugene D. Alexander*, guardian *ad litem* of infant defendants *Dorothy Heye Clemens* and *Antoinette Wagener Clemens*, respondents, appellants.

SHEARN, J.:

This case involves the application of the rules of apportionment of trust property between life beneficiaries and remaindermen, growing out of a distribution of the bulk of the assets of the Standard Oil Company of New Jersey on December 1, 1911, in pursuance of a decree of the United States Circuit Court, adjudging that company and its constituent companies to be an unlawful combination or conspiracy in restraint of trade and enjoining the continuance of the combination. Numerous questions have arisen out of the complexity of the corporate transactions, but one basic principle applies to all. The main question deals with the correct apportionment of the distributed shares of capital stock of the subsidiary companies that substantially constituted the Standard Oil Trust and supplied five-sixths of its earning capacity.

Briefly stated, the essential facts underlying the main question are these: Charles F. G. Heye died on February 8, 1899, leaving a will executed March 23, 1898, which was admitted to probate on February 17, 1899. He left surviving him his wife, a son and a daughter. By his will he gave his residuary estate to the United States Trust Company of New York, as trustee, and directed that it be divided into three equal parts. The trustee was directed to pay and apply "the net income, rents, issues and profits" of one part to the use of the wife for life, the principal to go to such persons as she might appoint by will, and, in default of appointment, to his children. The net income of one part was to be applied to the use of his daughter during her life and upon her death leaving issue the principal was to go to such issue. The net income of the third part was to be applied to the use of the son until he arrived at a certain age, when the principal share was, with the exception of \$100,000 reserved in trust, to be paid over to him.

Among the assets of which the testator died possessed and which the trustee received from the executrix of the will on May 10, 1899, were certificates for certain shares and fractional shares of the capital stock of twenty corporations which had, prior to the ouster judgment of the Supreme Court of Ohio in 1892, constituted the so-called Standard Oil

Trust, created by agreements dated January 2 and 4, 1882, by which the shares of stock of certain companies theretofore held by certain individuals and corporations for common account were transferred to trustees, who issued certificates of beneficial interest therein to the beneficial owners of the stocks. These certificates for shares and fractional shares of the capital stock of the twenty corporations represented the equivalent of \$370,000 par value of the aforesaid Standard Oil Trust certificates which had been owned by the testator and surrendered by him to the trustees of the Standard Oil Trust pursuant to a plan adopted to provide for its dissolution. Included in these certificates owned by the testator when he died were 380 and certain fractional shares of the Standard Oil Company of New Jersey. In the year 1899 a plan was perfected for bringing these twenty oil companies again under common and unified control and management by constituting the Standard Oil Company of New Jersey the parent or holding company and transferring to it the ownership of the capital stock of the nineteen other companies. With this end in view, in the year 1899 the capital stock of the Standard Oil Company of New Jersey was increased from 100,000 shares of the par value of \$10,000,000 to 1,100,000 shares of the par value of \$110,000,000, of which 1,000,000 shares were common stock and 100,000 shares were preferred stock, the stock of the Standard Oil Company of New Jersey previously outstanding being converted into preferred stock, and the officers of that corporation were duly authorized to issue said certificates of common stock in purchase of the stock of the remaining nineteen of said corporations and its own preferred stock at the rate of one share of such common stock for shares or various fractional shares of the stock of such other corporations and of its preferred stock. Accordingly, on or about August 11, 1899, the trustee under the will of Charles F. G. Heye surrendered to the Standard Oil Company of New Jersey the said certificates of stock of the said twenty corporations, which certificates were actually in the possession of Mr. Heye at the time of his death, and received in exchange therefor 3,700 shares of the common stock of the Standard Oil Company of New Jersey. Thereupon the trustee in dividing the residuary estate of Mr. Heye

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into three equal parts as directed by his will allotted 1,234 shares of the said common stock of the Standard Oil Company of New Jersey to the trust created for the benefit of the testator's wife, 1,233 shares to the trust created for the benefit of the daughter, and 1,233 shares to the trust created for the benefit of the son. As trustee for the wife the trustee has ever since held said shares allotted to the trust created for her benefit; and also has ever since held the shares allotted to the trust created for the benefit of the daughter; but, as trustee for the benefit of the son, the trustee had prior to September 1, 1911, duly disposed of all of the shares of stock allotted to the trust created for his benefit with the exception of 47 shares. At the time the Standard Oil Company of New Jersey acquired the whole of the stocks of the nineteen other companies, it already owned some subsidiary companies and during the life of the trust it acquired the stock of still others, so that by 1911 it held either all or a majority of the stock of thirty-three companies engaged in the business of producing, refining and distributing oil. Between January 1, 1899, and December 1, 1911, the business of these combined companies was phenomenally prosperous and the Standard Oil Company of New Jersey earned net \$823,893,961.13. During the same period it distributed to its stockholders in dividends, after reserving as working capital \$328,691,788.13, the total sum of \$495,202,173, so that the life beneficiaries of this trust received dividends averaging annually forty per cent. While the individuality of each of the affiliated corporations was scrupulously maintained and all business transactions were transactions of the different corporations severally, throughout the period between 1899 and 1911, as in fact had been the case since the Ohio trust agreement of 1882, the business carried on by the Standard Oil Company of New Jersey and its subsidiaries was conducted as a unified or common business, all the funds employed being utilized by the management as a common fund out of which all amounts requisite for construction and development by the several companies were supplied, each organization being debited or credited with the respective amounts advanced or borrowed and interest being duly debited and credited thereon. In the course of its operations the combination again came in con-

flict with the law and in 1911 on the suit of the Federal government a decree was entered in the United States Circuit Court declaring the Standard Oil Company of New Jersey and its thirty-three subsidiary companies to be an unlawful combination or conspiracy in restraint of trade, upon the ground that the New Jersey company had acquired the power to control the original nineteen constituent companies and the other companies named in the decree, and to manage their trade, "without competition among themselves, as the trade and business of a single person," and the decree enjoined the continuance of this unlawful combination, but expressly provided that "the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination." On July 28, 1911, the directors of the Standard Oil Company of New Jersey passed a resolution to carry out this decree and authorized that the shares of stock of each of the corporations owned by the company be distributed ratably to the stockholders, and all of the stocks were so distributed on December 1, 1911, except the stock of the Anglo-American Oil Company which was distributed on January 20, 1912. The plaintiff as trustee of each of the trusts created by the will of Charles F. G. Heye received the *pro rata* share of the distributed stocks pertaining to the Standard Oil stock forming part of the principal of such trust, and included in the stocks so distributed were the stocks of seventeen of the twenty companies, stock in which was owned by the testator at the time of his death, and of several companies whose stock was already held in 1899 by the Standard Oil Company of New Jersey or by some one of the seventeen companies. The only stocks of the original (twenty) companies owned by the testator, and represented by the 2,514 shares of the Standard Oil Company of New Jersey then in the hands of the trustee, which were not redistributed and turned back in kind to the trustee, were the shares of three companies, to wit, Standard Oil Company of New Jersey, Forest Oil Company and North Western Ohio Natural Gas Company. The stock in the last-named company was not ordered to be distributed and continued to be owned by the Standard Oil

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Company of New Jersey and was represented by the stock of that company still held by the trustee. The Forest Oil Company had been absorbed by the South Penn Oil Company in 1902, and the testator's interest in that company came back to the trustee in the shares of the South Penn Oil Company. It is upon this state of facts that the life beneficiaries lay claim to all of the stocks distributed to the trustee in pursuance of said decree, upon the ground that the distribution amounts to an extraordinary dividend of profits, payment of which to the life beneficiaries will not, as it is claimed, entrench upon or impair the integrity of the *corpus* of the trust estate. A much more detailed account of these transactions is set forth in the carefully prepared opinion of Mr. Justice DOWLING.

Reduced to its simplest terms, the situation was this: The *corpus* of the trust was originally a proportionate share interest in twenty oil companies represented by capital stock of each; that same interest continued from 1899 to 1911, represented by the shares of one holding company; after the distribution of December 1, 1911, that same proportionate share interest in the original twenty companies was still held by the trustee, represented by capital stock of eighteen of the original companies.

Claiming the redistribution of 1911 to have been in the nature of an extraordinary dividend, the life beneficiaries demand that there be turned over to them the entire share interest of the seventeen\* companies transferred back to the trustee, leaving only as constituting the *corpus* of the estate the original interest in two companies, represented by the stock of the Standard Oil Company of New Jersey, which by the distribution had been stripped of properties constituting five sixths of its earning capacity. To justify this extraordinary result reliance is placed upon (1) the definition of the distribution as an extraordinary dividend, and (2) the fact that the book value of the stock of the Standard Oil Company of New Jersey after the distribution of December 1, 1911, which was \$281.72 a share, was greater than at the agreed

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\* Really eighteen, as the Forest Oil Company had been absorbed in the South Penn Company.— [NOTE BY THE COURT.]

date of the creation of the trust December 31, 1899, when it was \$202.32 a share. As this figure of \$202.32 included the book value of the stocks of all the nineteen subsidiary corporations originally owned by the testator, the value of the Standard Oil Company of New Jersey stock remaining in the trust after the distribution of December 1, 1911, even if all the distributed stocks went to the life beneficiaries, would exceed the value of the entire trust estate at the creation of the trust. Therefore, the life beneficiaries contend, if all the distributed stocks went to them, that the integrity of the trust fund would still be preserved because its original *value* would not have been impaired.

To call the distribution of 1911 an extraordinary dividend does not determine the question presented. In spite of the stress laid on a mere matter of definition, the life beneficiaries concede, as they must, that to entitle them to an apportionment of these stocks the result must be achieved without entrenching in any way upon the *corpus* of the original trust. Whatever development there has been in the law dealing with this subject of apportionment, whether in this State or elsewhere, it has been uniformly recognized that at all times the integrity of the *corpus* of the trust must be preserved. No change whatever was made in this rule by the much-cited case of *Matter of Osborne* (209 N. Y. 450). Indeed the decision in the *Osborne* case strongly emphasized the necessity of maintaining the *corpus* unimpaired, the Court of Appeals having expressly held that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the *corpus* of the trust to maintain that *corpus* unimpaired. The *Osborne* case is carelessly referred to as though it had enlarged the rights of life tenants. On the contrary, it materially limited and curtailed them. Prior to the decision of the *Osborne* case, extraordinary dividends declared by a corporation out of accumulated earnings were apportioned to the life tenant, whether earned before or after the creation of the trust estate. (*McLouth v. Hunt*, 154 N. Y. 179; *Lowry v. Farmers' Loan & Trust Co.*, 172 id. 137.) The decision in the *Osborne* case changed this rule, curtailed these rights of life tenants by limiting them to apportionment of accumulations made after

the creation of the trust and, as above stated, emphasized the right of the remainderman to have the integrity of the *corpus* of the trust preserved.

The fundamental inquiry, therefore, is whether the apportionment contended for would impair the integrity of the trust fund.

The *corpus* of the trust fund established in 1899 consisted of capital stock in twenty companies. This means that the trustee owned that definite proportion of the capital assets of *each* company which the shares of stock held in the trust bore to the whole capital stock. Whatever doubt may have previously existed about this was definitely set at rest by the unanimous adoption by the Court of Appeals of the prevailing opinion written by Mr. Justice SCOTT in this court in *Matter of Schaefer* (178 App. Div. 117; *affd.*, on opinion of SCOTT, J., 222 N. Y. 533), for in the minority opinion (p. 131) sharp issue was taken with the basic proposition formulated by Mr. Justice SCOTT that the stock owned and sold by the trustees "represented and stood for one-half of the assets of the company, and those assets in part represented accumulated profits." So it may be taken as settled, for a starting point, that the *corpus* of this estate consisted of that proportion of the capital assets of *each* of the twenty companies which the shares of stock held in the trust bore to the whole capital stock.

When the shares of the nineteen subsidiary companies were transferred to the Standard Oil Company of New Jersey the ownership of the capital assets represented by the trust was transferred to the Standard Oil Company, and the stock of the latter company transferred to the trustees in exchange for the stock of the subsidiary companies represented a proportionate part of what had been the capital assets of both the Standard Oil Company and the subsidiary companies.

When effect was given to the decree of the Supreme Court in 1911 the Standard Oil Company retransferred to its stockholders, the original holders of the stock in the subsidiary companies, the stock which these holders had transferred to it in 1899, thus revesting those stockholders with their interests in the capital assets of the subsidiary companies.

The necessary result of this action was to deplete the capital



assets of the Standard Oil Company, because there was subtracted from those assets the capital assets of the subsidiary companies, which constituted a part of the trust fund when it was set up.

The same result would have followed if the Standard Oil Company in 1911 had sold all the stock of the subsidiary companies for cash and then had distributed this cash *pro rata* among its stockholders. This would have been a partial liquidation of the trust, for the cash would have been derived from and have represented a part of the capital assets of the trust. (*Matter of Schaefer, supra.*)

It follows obviously, therefore, that if the *corpus* of the trust be stripped of its interest in the assets of seventeen of the original companies composing it, and left only with the stock of the depleted Standard Oil Company of New Jersey, now minus the properties constituting five-sixths of its earning capacity, the integrity of the trust would not only not be preserved but it would be completely disrupted and its major part handed over to the life tenants. Instead of the remaindermen succeeding ultimately to the testator's interest in the assets of twenty companies, they would get only his interest in two, the Standard Oil Company of New Jersey and the North Western Ohio Natural Gas Company (owned by the former), while the life tenants, in addition to having received annual dividends of forty per cent, would now have the testator's interest in the assets of each of the eighteen other companies constituting the original *corpus* of the trust. No such result was intended by the testator and no rule of law leads to a result so manifestly unjust.

Stress is laid upon the fact that the *value* of the stock left in the trust would exceed the value of all the stocks in the trust when it was created. But this affords no justification for disrupting the *corpus* of the trust. If the only stock in the trust originally had been that of the Standard Oil Company of New Jersey its book value would have been a pertinent fact in determining how any extraordinary dividend of that company should be apportioned, under the rule in the *Osborne* case and under the general rule with reference to preserving the integrity of the trust fund. But when the *corpus* of the trust consists of a definite interest in each of

several companies, the book value of *one* has no bearing upon the integrity of the trust as affected by taking away from the *corpus* the testator's interest in *all the other* companies.

The life beneficiaries have built up their case upon the fact that Judge CARDOZO in *Matter of Brann* (219 N. Y. 263) characterized this Standard Oil distribution as an "extraordinary dividend." As already shown, so far as concerns their right to have apportioned to them these stocks in the seventeen original subsidiary companies, nothing is decided by calling the distribution an extraordinary dividend because, even if such be its character, the stocks cannot go to the life beneficiaries for the reason that thereby the *corpus* of the trust would be disrupted. Moreover, it is very unsafe to attempt to arrive at a correct result in such a case as this by applying a rule to a mere definition. But, it should be pointed out, when Judge CARDOZO used the words "extraordinary dividend" in the *Brann* case he was dealing with a very different question from any here presented. What Judge CARDOZO had to determine was what passed under a bequest of shares of Standard Oil stock contained in a will executed before the distribution of 1911 and republished after the distribution of that year. He expressly speaks of the distribution as an extraordinary dividend "declared during the life of the testatrix," and then proceeds to demonstrate from the provisions of the codicil that the testatrix did not intend to give the subsidiary shares with the main bequest. Of course the distribution of 1911 was in a sense an extraordinary dividend, but under the ruling in the *Osborne* case, followed by *Matter of Megrue* (170 App. Div. 653; *affd.*, 217 N. Y. 623), it is the duty of the court to inquire in case of an extraordinary dividend what its sources are and to credit to capital account so much thereof as is derived from or constitutes a distribution of capital (including profits accrued before the creation of the trust), and to credit to income account so much thereof as is derived from or constitutes a distribution of profits accrued during the lifetime of the trust. This rule works justice both to remaindermen and to the life tenant and accords with the rule laid down in the *Osborne* case. When we inquire as to the source of the distribution under consideration, we find that it constituted the major

part of the capital of the original trust. Its allotment to the life beneficiaries would, therefore, impair the integrity of the trust and be illegal, and the situation would not be one which changed by calling the distribution an extraordinary dividend.

There are certain other matters dwelt upon by the life beneficiaries which seem to me to be wholly inconclusive. One is that "the vouchers of the company and its books treat the distribution as one of reserved profits 'or' accumulated profits." These statements in the books are mere bookkeeping entries and cannot affect the *fact* that the transaction was a redistribution of capital assets.

Again the fact that the undistributed cash earnings in the hands of the Standard Oil Company at the time of the distribution equalled or exceeded the so-called book value of the stocks distributed does not make the distribution a distribution of earnings or profits. It did not pretend to be any such thing but was avowedly a means adopted by the company to meet the requirements of the judgment which called upon it to dispose of, not its accumulated profits, but its holdings in the subsidiary companies.

Finally the fact that the so-called "book value" of the Standard Oil Company's shares was larger after the distribution in 1911 than it had been when the trust was set up in 1899, does not prove that the capital of the trust fund was not depleted by taking away from the capital assets of the parent company the capital assets of the subsidiary companies. Very many things may have operated to increase the value of the capital assets which were of the Standard Oil Company in 1899 when the trust was set up. At all events the life beneficiaries are not entitled to share in the accumulated earnings, however large, so long as the company kept those earnings in its treasury and neither distributed them as cash dividends nor gave stock dividends to represent them. As was distinctly held in the *Osborne* case the only value of the trust assets which is to be considered is the *intrinsic* value; market value, good will and like considerations cannot be considered in apportioning a dividend. (*Matter of Osborne, supra.*) The remaindermen are entitled to the benefit of any accretion in value of the *corpus* of the trust which does not

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arise from the application to capital purposes of earnings accruing after the creation of the trust.

*Equitable Life Assurance Society v. Union Pacific R. R. Co.*, quoted from at length in the opinion of Mr. Justice DOWLING, did not involve any question of apportionment between remaindermen and life tenants. As Mr. Justice CLARKE said in this court (162 App. Div. 81, 86): "It must be borne in mind at the outset that the matter under discussion is one of corporation law. It arises and must be decided between the corporation and its several classes of stockholders. The law applicable to wills and to trust estates, to life tenants and remaindermen, is beside the mark."

Further, the Baltimore and Ohio stock involved was a mere investment in the stock of an entirely separate railroad which was not operated as a part of the Union Pacific Railroad Company or of its subsidiaries; and the stock was purchased long after the plaintiff in that case became a stockholder in the Union Pacific Railroad Company.

Coming now to the remaining sixteen corporations whose stocks were distributed on December 1, 1911: Eight were companies whose stocks were owned by the Standard Oil Company of New Jersey in 1899 and prior to the testator's death. These stocks were properly apportioned to capital, for the testator's ownership of a share of all of the assets of the Standard Oil Company of New Jersey carried with it a similar interest in the stock of these subsidiary companies. This interest could not be severed and allotted to income without impairing the integrity of the *corpus* of the trust. Three of the companies, Southwest Pennsylvania Pipe Line Company, Washington Oil Company and Crescent Pipe Line Company, were companies whose stocks were acquired by the Standard Oil Company of New Jersey subsequently to December, 1899, from its subsidiary company, the National Transit Company. Shares of the National Transit Company were a part of the *corpus* of the original trust which were transferred to the Standard Oil Company of New Jersey in 1899 and transferred back to the trustee in 1911. The shifting of the ownership of stock in these three subsidiary companies, owned by the National Transit Company, to the Standard Oil Company of New Jersey, which in turn owned

the stock of the National Transit Company, in no manner affected the testator's interest in the assets of those three subsidiary companies, for his proportionate interest was at all times maintained, at one time represented by his shares in the National Transit Company and later by his shares in the Standard Oil Company of New Jersey, issued to him in exchange for his shares in the National Transit Company. This interest in these three subsidiary companies, which constituted a part of the *corpus* of the original trust, could not be severed therefrom and allotted to the life beneficiaries without impairing the integrity of the trust. Two other companies, the Cumberland Pipe Line Company and the Prairie Oil and Gas Company, were companies whose stocks were owned by the National Transit Company and distributed by that company in 1911 pursuant to the decree and the resolution adopted to carry it out. The Cumberland Pipe Line Company was organized in 1901 by the National Transit Company which took all of its stock. Its lines were located in Kentucky and it gathered oil in the field for delivery to the Eureka Pipe Line Company for conveyance across the West Virginia border, where it was delivered to other Standard Oil pipe line companies for transportation to Standard Oil refineries. Its stock was not held as an investment but was taken over obviously for the purpose of adding to the working plant of the National Transit Company and constituted a part of the capital assets of that company. It does not appear that it was in any sense paid for out of surplus earnings of the National Transit Company accumulated after the formation of the trust. The Prairie Oil and Gas Company was incorporated in 1900. All of its stock was taken by the Forest Oil Company, one of the original twenty companies constituting the *corpus* of the trust, and was transferred in 1902 to the National Transit Company, which held it down to the distribution of stocks in 1911. The Forest Oil Company was a producing company operating in Pennsylvania, all of the stock of which had been held by the Standard Oil trustees and had been distributed by them and acquired by the Standard Oil Company of New Jersey by the issue of its own stock in exchange therefor in and after 1899. The Prairie Oil and Gas Company was the Standard Oil producing company in

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the mid-continent field. It supplied from that field a very large part of the oil used by the Standard Oil refineries. The stock of the Prairie Oil and Gas Company was not held by the National Transit Company as an investment but represented an important part of its working plant and constituted a part of its capital assets. It does not appear that the stock of the Prairie Oil and Gas Company was acquired by the National Transit Company out of earnings accumulated after the formation of the trust. The shares of the National Transit Company, which constituted one of the twenty original companies in the *corpus* of the trust, stood for and represented ownership of an interest in the shares of the Cumberland Pipe Line Company and the Prairie Oil and Gas Company, which constituted a part of the capital assets of the National Transit Company, and this same interest was represented by the shares of the Standard Oil Company of New Jersey until the shares of the National Transit Company were redistributed to the trustee in 1911. When, therefore, the National Transit Company in pursuance of the policy of disintegration under the decree, divested itself of these properties in 1911, if the shares in these two subsidiary companies had been allotted to the life beneficiaries the integrity of the trust fund would have been impaired. They were, therefore, properly allotted to principal.

The remaining three companies of the sixteen now under consideration present a different situation. These are the Colonial Oil Company, Standard Oil Company (California) and Standard Oil Company (Nebraska). The stocks of all three of these companies were acquired by the Standard Oil Company of New Jersey out of its cash earnings subsequently to 1899. The Colonial Oil Company was organized in March, 1901, all of the \$250,000 of stock being taken by the Standard Oil Company of New Jersey for cash at par. The company was organized to do the Standard Oil Company's marketing business in Australia, Portugal and its dependencies. The Standard Oil Company (California) was originally organized under the name Pacific Coast Oil Company. Its capital stock was \$1,000,000, all of which was purchased in December, 1900, by the Standard Oil Company of New Jersey for cash. At the time of the purchase the company owned a small

refinery near San Francisco and a small amount of producing property. The name of the company was changed to Standard Oil Company (California). On July 1, 1902, its capital was increased to \$3,000,000; on May 6, 1903, to \$6,000,000; on October 16, 1906, to \$17,000,000, and on August 7, 1911, to \$25,000,000. All of these increases of stock were issued for cash at par to the Standard Oil Company of New Jersey at or about the time when the increases took place. The California company erected a very large refinery at San Francisco, constructed an extensive system of pipe lines and acquired a large amount of producing property. In 1906 all of the property of the Standard Oil Company of Iowa, which did the marketing business of the Standard Oil companies in the western states, northwest territories, Honolulu and the Hawaiian Islands, was transferred to the California company. The Standard Oil Company (Nebraska) was organized in 1906 with a capital of \$600,000, acquired by the Standard Oil Company of New Jersey for cash. It was organized to take over the Standard Oil marketing business of Nebraska theretofore carried on by the Standard Oil Company of Indiana, which latter company in 1906 conveyed to it all of its marketing stations, plants and facilities in Nebraska. While it does not definitely appear that the stocks of these three companies were acquired out of the surplus earnings accumulated after the formation of the trust, that fact may be fairly inferred from the dates of the transactions and their general nature. If there is any dispute about the fact, it will have to be determined on a reference or by stipulation. As all of the other facts have been agreed upon between the parties, this situation should present no practical difficulty. If these stocks were paid for out of earnings accumulated before the creation of the trust, these stocks were properly allotted to capital for the reasons stated with reference to the stock of the Southwest Pennsylvania Oil Company, Washington Oil Company and Crescent Pipe Line Company. Assuming, however, that these stocks were acquired out of earnings accumulated after the formation of the trust, which appears to be the fact, we think that the learned referee erred and that they should have been allotted to the life beneficiaries. It is true that prior to the distribution in 1911 these stocks

constituted a part of the capital assets of the Standard Oil Company of New Jersey and the properties were a part of its working plant in a business which, notwithstanding the preservation of the corporate identity of all these various companies, was conducted as a unified business under a common control and for the benefit of the Standard Oil Company of New Jersey. But the money withdrawn from earnings and used to purchase these stocks was not permanently capitalized. As was said in *Williams v. Western Union Telegraph Co.* (93 N. Y. 162, 191), quoted with approval by Judge Hiscock in *Equitable Life Assurance Society v. Union Pacific R. R. Co.* (212 id. 360, 372): "The company had made surplus earnings which it could have divided, but instead of dividing them it had invested them in property to facilitate and enlarge its business; and such property was found to be worth \$15,526,590. That sum constituted its surplus. It was commingled with the other property of the company and used for corporate purposes. But it was not beyond the reach of the dividend-making power of the directors. They could reclaim it for division among the stockholders, and, if practicable, convert it into cash for that purpose." Again, as was said in *Smith v. Dana* (77 Conn. 543): "Investment in permanent works does not and ought not to capitalize. Directors can in their discretion, fairly exercised, withhold profits and employ them in the conduct or enlargement of the business. By the same right they ought to be able to, and can, withdraw from any action which will enable the assets thus employed to be returned to their original condition as funds available for distribution to those to whom they might have been originally divided as dividends. Capital of this kind does not bear the perpetual stamp of capital. It simply constitutes a portion of the corporate assets which are within the discretionary control of the directors, which they may use for the corporate advantage in such ways as have the approval of their judgment, or, if that course seems wiser, cease using and by proper action withdraw from the corporate resources."

In the development of the law on this subject the inquiry in these apportionment cases is no longer confined to determining whether the distribution was capital or profits as such.



On this head Judge HISCOCK said in the *Equitable Life Case* (*supra*, p. 371): "As was made clear by Judge CHASE in his thorough consideration of this subject in *Matter of Osborne* (209 N. Y. 450), more frequently the much considered question in this class of cases has been whether the distribution impaired what was the *corpus* or capital of the trust fund when it became effective rather than whether it involved a division of the capital of the corporation." It is clear that the allotment of these stocks to income, acquired as they were after the creation of the trust and with surplus earnings accumulated after the formation of the trust, worked no impairment of the original *corpus* of the trust. So long as the Standard Oil Company of New Jersey retained and used these properties in its business, the life tenants had no ground of complaint. Neither would it have been any concern of theirs if the company had chosen to sell these properties and retain the proceeds as reserved working capital, in the absence of fraud or bad faith. But when the company ceased to use and undertook to distribute the properties, purchased with surplus earnings accumulated after the formation of the trust, the life tenants were concerned and were entitled to insist upon a proper distribution. Unlike *Matter of Rogers* (161 N. Y. 108), this distribution was made by a going concern. As the integrity of the *corpus* of the trust is thereby in no respect impaired, the stocks in these three companies on distribution should be allotted to the life beneficiaries, within the reasoning of *Matter of Schaefer* (*supra*) and *Matter of Osborne* (*supra*). It follows, of course, that all stock increases of the Colonial Oil Company, Standard Oil Company (California) and Standard Oil Company (Nebraska) acquired by the Standard Oil Company of New Jersey between 1899 and 1911 for cash at par out of its cash earnings accumulated after the formation of the trust should be allotted to the life beneficiaries.

The next question concerns similar stock increases so acquired by the Standard Oil Company of New Jersey between 1899 and 1911 from the Anglo-American Oil Company, Crescent Pipe Line Company, Northern Pipe Line Company, Ohio Oil Company, Southern Pipe Line Company, Standard Oil Company of New York, and Union Tank Line Company, all of which companies were either directly or through stock

control a part of the original *corpus* of the trust. In so far as the distribution of these stocks, paid for out of the accumulated earnings of the company after the formation of the trust, does not entrench in whole or in part upon the capital of the trust as received from the testator, these stocks should be allotted to the life beneficiaries, under the rule in the *Osborne* case. In determining whether such distribution entrenches upon the *corpus* of the trust, each corporation, a share in which constituted a part of the original trust, should be considered separately, and the book value of the stock constituting in part the capital of the trust fund as received from the testator should be ascertained in the manner prescribed in the *Osborne* case. The value of the investment or proportionate interest represented by the original shares after the distribution of December 1, 1911, was made is ascertained by the same method. The difference between the two shows whether there has been any impairment of the *corpus* of the trust represented by the shares of the particular corporation. Similar disposition should be made of the stock dividends declared and paid to the Standard Oil Company of New Jersey between 1899 and 1911 by its subsidiaries, Crescent Pipe Line Company, Indiana Pipe Line Company, Northern Pipe Line Company, Southern Pipe Line Company and Vacuum Oil Company.

A volume could be written on this aspect of the case, but a discussion of the matter and an analysis of the numerous cases dealing with varying aspects of the problem as the law has developed in this and other jurisdictions would serve no useful purpose, for, after all is said, the basic and determining inquiry is whether on a distribution of stocks acquired out of and representing surplus earnings after the formation of the trust an allotment thereof to the life tenants would entrench upon the *corpus* of the original trust. Apportionment on this simple basis is fair to both remaindermen and life tenants, is workable and tends to carry out the intention of the testator.

Further questions arise with respect to extraordinary distributions made since December 1, 1911, by corporations whose shares were distributed by the Standard Oil Company of New Jersey in December, 1911.

Stock dividends were declared by ten companies and

should go, subject to the rule of apportionment in the *Osborne* case, to the life beneficiaries. Similarly with the stock dividend declared by the Standard Oil Company of Ohio, declared but not paid on the date of the trustee's last supplemental account.

Two companies, the South Pennsylvania Oil Company and the Standard Oil Company (California) offered to stockholders rights to subscribe for additional stock at par. The learned referee, erroneously as we think, allotted these rights to the life beneficiaries. It has been uniformly held in this State that new shares of stock purchased by trustees in the exercise of subscription rights given to stockholders of the corporation, and the proceeds of the sale of such subscription rights, should be allotted to the principal of the trust and that the life tenant is not entitled thereto. (*Matter of Kernochan*, 104 N. Y. 618; *Stewart v. Phelps*, 71 App. Div. 91; 173 N. Y. 621; *Robertson v. de Brulatour*, 188 id. 301; *Richmond v. Richmond*, 123 App. Div. 117; *affd.*, 196 N. Y. 535.) It is contended that these cases have been overruled by the decisions made in *Matter of Harteau* (204 N. Y. 292) and *Matter of Osborne* (*supra*). In the *Harteau* case there was no question between remaindermen and life tenant. There was an extraordinary dividend of 100 per cent declared by a corporation upon its capital stock, shares of which were held by the trustees. The dividend was paid in cash and the trustees invested it in new stock of the corporation, to which as stockholders they had subscription rights, and the new stock thus purchased sold at a profit. The court treated the proceeds of sale as a dividend and apportioned it between principal and income. No question was raised in the case in any of the courts as to subscription rights or whether such rights should be treated as income of the trust estate. So far as the *Osborne* case is concerned, as has been already pointed out, this decision did not enlarge the rights of life tenants but materially limited and curtailed them. There seems to be, therefore, no reason for departing from the previously settled rule. These subscription rights should be allotted to the principal of the trust.

The Standard Oil Company of Kentucky on December 22, 1913, declared a cash dividend of \$200 per share payable to

the stockholders of record at the close of business January 31, 1914, and as a part of the same resolution of the board of directors the increased capital stock of the company to the amount of \$2,000,000 was offered to stockholders of record at the close of business January 31, 1914, at par in proportion to the stock then owned by them and the stockholders were authorized to pay for the same "by applying the cash dividend declared this day." It is to be noted that while the cash dividend and rights to subscribe accrued simultaneously, no condition was attached which required the stockholders to use the cash dividends to purchase the new stock. If the rights to subscribe had been given to stockholders without a cash dividend being declared at the same time, those rights would have belonged to capital, under the *Richmond* case. The legal character of those rights is not altered nor is the interest of capital in those rights changed by the fact that at the same time a cash dividend was declared sufficient in amount to pay for the new stock offered to the stockholders. If the trustee used the cash dividend to purchase the new stock and then subsequently sold the stock at a profit to the estate a disposition of this profit would be settled by *Matter of Harteau*, i. e., it would go to the life tenant. But merely because the dividend is declared and the subscription rights offered at the same time the rule of apportionment as to the subscription rights declared by the *Richmond* case, and as to the cash dividends, declared by the *Osborne* case, is not to be changed. This cash dividend should be apportioned under the *Osborne* case and the subscription rights allotted to the capital of the trust. Similarly with the subscription rights and cash dividends of the Title Guarantee and Trust Company.

A still further question as to subscription rights is raised by the Vacuum Oil Company having on April 4, 1912, offered the right to subscribe at par for 500 per cent of holdings of stock of that company and Swan & Finch Company having on August 14, 1912, offered the right to subscribe at par for 400 per cent of holdings of stock of that company. The referee has treated this as practically an extraordinary dividend or division of the surplus assets of those companies and allotted the rights to income. This was error, for it is

settled that the subscription rights belonged to capital. It can make no difference in principle merely because the right inuring to the holders of the stock is more valuable. Neither does this constitute a distribution of assets. It merely changes the outstanding number of shares representing the assets. The right is a valuable one and properly goes with the ownership of the shares because if it were not given and exercised the holder's proportion of interest in the assets of the company would be materially altered for the worse.

It remains to deal with two other distributors of stock, one by the Ohio Oil Company, which on February 1, 1915, distributed stock of the Illinois Pipe Line Company; the other by the Prairie Oil and Gas Company which on March 22, 1915, distributed stock of the Prairie Pipe Line Company. Prior to the decision of the *Pipe Line Cases* in 1914 (234 U. S. 548) the Ohio Oil Company and the Prairie Oil and Gas Company carried their pipe line properties in direct ownership. The Prairie Oil and Gas Company was incorporated in 1900. The Ohio Oil Company, however, was organized in 1887 and its entire capital stock was purchased by the National Transit Company in 1889. Accordingly the testator had an interest in the Ohio Oil Company, represented by his shares in the National Transit Company which were a part of the original *corpus* of the trust. Similarly with respect to the Prairie Oil and Gas Company, the trustees had an interest in it from shortly after its organization, growing out of the fact that all of its stock was taken by the Forest Oil Company, one of the twenty original companies in the *corpus* of the trust, which company in 1902 transferred it to the National Transit Company, which held it down to the distribution in 1911. After the decision in the *Pipe Line Cases*, which declared pipe line companies to be common carriers, the Ohio Oil Company and the Prairie Oil and Gas Company, in order to avoid regulation by the Interstate Commerce Commission, decided to separate from themselves and place in a separate ownership the pipe line properties. The Ohio Oil Company, therefore, caused the Illinois Pipe Line Company to be formed with a capital stock of 200,000 shares, of the par value of \$20,000,000, and sold to it all of its pipe line properties in return for the whole

capital stock of the Illinois Pipe Line Company. The Prairie Oil and Gas Company carried out a similar operation, transferring its pipe line properties to the Prairie Pipe Line Company in exchange for the entire capital stock of that company. Both the Ohio Oil Company and the Prairie Oil and Gas Company then distributed the stock of the newly-organized pipe line companies among their stockholders *pro rata*. In this manner the stock came into the hands of the National Transit Company, which made the distribution of 1911. The learned referee has allotted these pipe line shares to the life tenants. In so doing we think he erred. The stocks of the pipe line companies were not distributed by the Ohio Oil Company and the Prairie Oil and Gas Company as a dividend and were in no sense a dividend. All that the jugglery resorted to did was to segregate a part of the capital assets of each company, place the same in the ownership of separate corporations, retaining, however, in the hands of the National Transit Company, the owner of the stock of all the corporations, the same proportionate interest in the assets of each that it had before the transaction. When, therefore, the Ohio Oil Company, for example, whose stock was owned by the National Transit Company, transferred its pipe lines for the *entire* capital stock of the pipe line company and then turned the stock of the pipe line company over to the National Transit Company, there was no change whatever in the interest that the National Transit Company theretofore had in the properties owned by the Ohio Oil Company. The testator owned shares in the National Transit Company, and his share in the assets of these companies, represented by his stock in the National Transit Company, was a part of the original *corpus* of the trust. To allot the pipe line shares to the life beneficiaries would be tantamount to transferring to them a part of the original property in the trust and would violate the fundamental rule requiring the integrity of the trust to be preserved.

One final question remains, namely, the dates to be taken for making the calculations necessary for the apportionment of the dividends declared by the former subsidiary companies of the Standard Oil Company of New Jersey. There are two dates to be determined: (1) The date of the creation

or establishment of the trust, as to which the book value of the securities constituting the principal must be computed to ascertain the original intrinsic value of the shares in the several companies; and (2) the date to be taken for the purpose of ascertaining whether the capital of the trust will be impaired to any extent by extraordinary dividends declared. The life beneficiaries argue that the first date taken should be the date of the testator's death in February, 1899. The trustee claims and the referee has found that the first date should be May 10, 1899, upon which date it is agreed that the trustee received the securities from the executrix. We agree with the referee that the correct date to be taken is May 10, 1899, when the securities came into the hands of the trustee. This is indicated by Judge CHASE in *Matter of Osborne* (p. 485). As to the second date, the trustee urges that it be fixed as of the time of the distribution of December 1, 1911, irrespective of when the dividends were declared. This would doubtless save many complications but does not appear to be sound. If there is any impairment by reason of the declaration of an extraordinary dividend the impairment exists when the dividend is declared. The second date to be taken is that fixed by the referee, namely, the date of the declaration of the dividend. This was also plainly indicated by Judge CHASE in *Matter of Osborne* where, after saying that the intrinsic value of the trust investment is to be found as "existing at the time of the creation of the trust," he said: "The value of the investment represented by the original shares *after the dividend has been made* is ascertained by exactly the same method."

The judgment should, therefore, be modified by allotting to the principal of the trust fund instead of to the life beneficiaries (1) the stocks of the thirty-three companies received by the plaintiff from the Standard Oil Company of New Jersey to December, 1911, except, (a) the stocks and stock increases of the Colonial Oil Company, Standard Oil Company (California) and Standard Oil Company (Nebraska); (b) stock increases acquired by the Standard Oil Company of New Jersey between 1899 and 1911 from the Anglo-American Oil Company, Crescent Pipe Line Company, Northern Pipe Line Company, Ohio Oil Company, Southern

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Pipe Line Company, Standard Oil Company of New York and Union Tank Line Company; (c) stock dividends declared and paid to the Standard Oil Company of New Jersey between 1899 and 1911 by its subsidiaries Crescent Pipe Line Company, Indiana Pipe Line Company, Northern Pipe Line Company, Southern Pipe Line Company and Vacuum Oil Company; (2) stock subscription rights declared and offered subsequent to December 1, 1911; (3) the Illinois Pipe Line Company stock received by plaintiff February 6, 1915; (4) the Prairie Pipe Line Company stock received by plaintiff March 25, 1915; and as so modified the judgment should be affirmed, with costs to all parties who have appeared on this appeal, payable out of the trust fund.

CLARKE, P. J., and LAUGHLIN, J., concurred; PAGE, J., dissented in part; DOWLING, J., dissented.

LAUGHLIN, J. (concurring):

I concur in the opinion of Mr. Justice SHEARN, but notwithstanding the number and length of the opinions written on this appeal I deem it proper to add a few sentences to emphasize my views on the point on which Mr. Justice PAGE and Mr. Justice SHEARN differ.

If the combination of these companies had been legal the investment of the surplus earnings of the constituent companies by the Standard Oil Company of New Jersey in the organization of the Colonial Oil Company and the Standard Oil Companies of California and Nebraska would have remained capital on the theory very lucidly developed and discussed in the opinion of Mr. Justice PAGE. The decree of dissolution evidently proceeded upon the theory that the acts of the Standard Oil Company of New Jersey in representing the various companies whose stock it held were to be deemed valid until the date of the decree, for there was no annulment of the corporations it organized and by the decree of dissolution it was permitted to distribute the stock of all the corporations including those it organized among its shareholders in the proportion to which they were equitably entitled. This presumptively was on the theory that during the period of the illegal combination it was necessary to



regard the Standard Oil Company of New Jersey as acting for and representing the constituent companies as agent, and doubtless any other course would have been impracticable. But after the decree of dissolution which decided that the combination was illegal it was no longer competent for the board of directors of the Standard Oil Company of New Jersey, in my opinion, to act for or represent the constituent companies. It was then merely authorized to carry out the decree of dissolution and, therefore, the action of its board of directors can be given only that effect. Undoubtedly, if the constituent companies whose surplus earnings were used in the purchase of this stock had themselves purchased it with their surplus earnings they could have subsequently disposed of it and have distributed the proceeds as dividends, but by operation of the decree that power is now necessarily gone owing to the fact that it severed the relations of the constituent companies. If the decree of dissolution had annulled these three corporations and directed that the assets be returned to the respective companies with whose funds they were organized such assets in the hands of the respective companies to which they would be returned would still remain capital until action by the respective boards of directors authorizing their distribution as dividends; but in that event they might have been distributed as dividends. As already observed that power is gone and forever, and neither the funds nor the stock representing the investment could under the decree of dissolution be returned to the respective companies whose funds were used in the organization of these three companies. We have then a case of the *surplus earnings* of the respective corporations invested in the organization of other corporations and permanently severed from the companies whose funds they were. Under the decree of dissolution which leaves these three companies validly organized no one is now authorized to distribute as dividends the moneys with which the three companies were organized. The investment is no longer beneficial to the companies whose funds were thus invested. They can neither hold these investments as capital, nor distribute them as dividends, and no longer have any ownership in or control over such investments. Those moneys are as definitely and permanently

severed from the respective companies from which they came as if they had been distributed as dividends. Their distribution it is true has not been through action of the respective boards of directors but has been by operation of the decree of dissolution. The *stock*, therefore, of these three companies now coming into the hands of the trustee by virtue of the decree of dissolution represents *surplus* earnings of the companies whose funds were used to organize them and under the decision of this court in *Matter of Schaefer* (178 App. Div. 117) and of the Court of Appeals which affirmed on the opinion of Mr. Justice SCOTT here (222 N. Y. 533), it seems to me they must be deemed to represent surplus earnings to which the life beneficiaries are entitled. In the opinion in that case Mr. Justice SCOTT said: "Where the trust fund consists of corporate stock, the life tenant will ordinarily be limited to receiving only so much of the profits as the corporation sees fit to distribute in dividends, but when the accumulated profits come into the hands of the trustee in any form or manner the life tenant is entitled to receive them." Here the shares in these three companies represent accumulated profits only and have now come into the hands of the trustee. I am of opinion, therefore, that the life beneficiaries are entitled thereto.

PAGE, J. (dissenting in part):

I concur in the opinion of Mr. Justice SHEARN, except as to the disposition of the stock of the Colonial Oil Company, Standard Oil Company (California) and Standard Oil Company (Nebraska). The time, method and purpose of the acquisition of these stocks by the Standard Oil Company of New Jersey are stated in the opinion of Mr. Justice SHEARN and need not be repeated. His conclusion is that such portions of these stocks as were purchased out of the surplus earnings of the Standard Oil Company of New Jersey accumulated prior to the creation of the trust should be allotted to capital, and such as were purchased out of surplus earnings accumulated after the creation of the trust should be distributed to the life beneficiaries. In my opinion, the determining factor is not the time of the accumulation, but the purpose and appropriation of the fund which had been accu-

mulated, whether it consisted of funds permanently reserved for working capital and paid out in the purchase of the stock of these corporations as a means of extending their plant and facilities in producing and distributing their product, or merely as an investment of current profits which were applicable to dividends. If the first, they were capital assets; if the second, they were properly income.

The Standard Oil Company of New Jersey in 1899 filed an amended certificate of incorporation, whereby its capital stock was increased from \$10,000,000 to \$110,000,000, and upon the issuance of this new stock the various stocks which constituted the *corpus* of the trust estate were exchanged, as has been fully set forth in the opinions of Mr. Justice SHEARN and Mr. Justice DOWLING. This amended certificate of incorporation contained the following provision: "The corporation may use and apply its surplus earnings, in accumulated profits authorized by law to be reserved, to the purchase or acquisition of property and to the purchase or acquisition of its own capital stock from time to time, to such extent and in such manner and upon such terms as its Board of Directors shall determine; and neither the property nor the capital stock so purchased or acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the declaration or payment of dividends unless otherwise determined by a majority of the Board of Directors or a majority of the stockholders. \* \* \* The Board of Directors shall have power \* \* \* to fix the amount to be reserved as working capital."

On August 1, 1899, the following resolution was adopted by the board of directors of the said company: "*Resolved*, that all of the accumulated profits of the Company to this date, in excess of the amount required to pay dividends of 1½% on the preferred and 5% on the outstanding common stock be reserved as working capital." In 1901 (N. J. Laws of 1901, chap. 110, amdg. N. J. Laws of 1896, chap. 185, § 47) the Corporation Law of New Jersey was amended to provide: "Unless otherwise provided in the original or amended certificate of incorporation, or in a by-law adopted by a vote of at least a majority of the stockholders, the directors of every

corporation created under this act shall, in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand." (See 2 Comp. Stat. 1629, § 47.) The extract from the amended certificate of incorporation (*ubi supra*) gave the right to the directors to determine the extent to which surplus earnings should be reserved, and that profits so reserved and the extent to which they should be applied in the purchase of property or stock, or the property or stock so purchased, should not be regarded as profits for the declaration of dividends unless otherwise determined by a majority of the directors or a majority of the stockholders. On November 17, 1902, the board of directors adopted a resolution declaring a dividend of one and one-half per cent on the preferred stock and ten per cent on the common stock, and further "*Resolved*, that all of the accumulated profits to this date in excess of the amounts required to pay dividends of one and one-half ( $1\frac{1}{2}\%$ ) per cent on the preferred stock and ten dollars (\$10) per share on the outstanding common stock be reserved as working capital." Since November 17, 1902, each of the regular dividends declared by the said company has been authorized in the foregoing form, except that since August 15, 1911, such resolutions have contained no reference to preferred stock.

The referee has found "That between 1899 and the distribution of stock in 1911, refineries at new points were established, large additions were made to the system of pipe lines and a number of new companies were organized and transfers of property and marketing facilities made between the different companies. The business which at the time of the distribution of stock in 1911 was carried on by the Standard Oil Company of New Jersey and its subsidiaries was the outgrowth and continuation of the same business which at the time of the execution of the trust agreement of 1882 was carried on by or through companies or limited partnerships named in the trust agreement, and which at least from the

date of said agreement was conducted as a unified or common business. The individuality of each of the affiliated corporations or organizations was scrupulously maintained, their accounts were kept entirely separate and distinct, all business transactions were transactions of the different organizations severally, but the good of the whole was sought rather than the advancement of any single organization at the expense of the whole. New refineries were established and existing refineries enlarged or abandoned, pipe lines constructed, producing properties acquired or developed, and other facilities acquired or created according to the requirements of the business as an entirety. New corporations were organized or existing corporations utilized as instrumentalities for the convenient transaction of the business, and the plants and properties employed in the business were vested in such corporations and from time to time transferred from one corporation to another as convenience required, and all the funds employed in the business were utilized by the management as a common fund out of which all amounts requisite for construction and development by the several companies were supplied, each organization being debited or credited with the respective amounts advanced or borrowed and interest being duly debited and credited thereon."

Thus it would appear that the reserve for working capital authorized by the amended certificate of incorporation of the Standard Oil Company of New Jersey was used for the development and extension of the plant and facilities of the company. Where it was deemed best, to accomplish this purpose, to organize a new corporation or to increase the capital of an existing corporation, the entire stock of such corporation, or the increase thereof (the Standard Oil Company of New Jersey holding all the stock theretofore issued), was taken by the Standard Oil Company of New Jersey, and the money paid to the subsidiary corporation was paid out of this reserve for working capital. The stock thus purchased represented such an appropriation of this fund and was an enhancement of capital, the same as it would have been had the money been paid directly for the purchase or erection of the producing, manufacturing or distributing plants. The value of the capital stock of the Standard Oil Company

of New Jersey was enhanced by the value of the stock thus purchased, and the dividends paid to the stockholders were increased by the net earnings of these plants, which were paid to that company upon the stock so acquired. When, therefore, the Standard Oil Company distributed these stocks to its stockholders pursuant to the decree of the United States court, it distributed the stock so acquired as a part of the capital invested in the business. Although the fund from which the money was paid had been accumulated from undistributed profits, these profits had been withdrawn from profits distributable in dividends, pursuant to the authorization in the amended certificate of incorporation, which authorized the directors so to withdraw them, and which further provided that such investments "shall not be regarded as profits for the purpose of declaration or payment of dividends unless otherwise determined by a majority of the Board of Directors or the stockholders." Neither the directors nor stockholders of the said company ever made such a determination. The effect of the decree of the United States court was not to distribute those stocks to the stockholders as dividends, nor did that decree work a dissolution of the corporation or of any of its subsidiaries. The corporations all remained going concerns, carrying on their several business enterprises. The Standard Oil Company was deprived of the co-operation of the subsidiary companies, but still operated such plants as it owned prior to 1899 and the accretions thereto. The subsidiary companies — these three with the others — mentioned in the decree, their officers, directors, agents, servants and employees, were enjoined and prohibited from paying any dividend to the Standard Oil Company on account of the stock held by it, or from allowing the latter company to vote, or to direct the policies or exercise any control whatsoever over the corporate acts of the subsidiary companies. But the Standard Oil Company was not prohibited from distributing ratably to its shareholders the shares to which they were equitably entitled in the stocks of the subsidiary companies.

This is what the Standard Oil Company of New Jersey did. The effect of this was merely to transfer from that company the stocks that it was holding to its stockholders,

thus transferring to the equitable owners of such stock the legal title. A stockholder is the holder of a certificate that he is the owner of a specific share of the joint property and assets that are held by the corporation for all the stockholders. The legal title is in the corporation, but the stockholders are the equitable owners. Therefore, the transfer to the stockholders of the Standard Oil Company of the stock of these subsidiary companies ratably was merely a transfer of the legal title, to that extent, of the common property, so that each became the legal owner of that of which theretofore he had been the equitable owner. This was in no sense a dividend, but a transfer of capital assets. I am aware that Judge CARDOZO has characterized this distribution as "in effect, an extraordinary dividend." (*Matter of Brann*, 219 N. Y. 263, 267, revg. 171 App. Div. 800.) A careful reading of the opinion will show that the question whether this distribution was a dividend was not a determinative factor in the case. The distribution was made in the lifetime of the testatrix, and the question was whether the stock in the subsidiary corporations passed under the bequest of the original stock, or to the residuary legatee; and as was stated in the dissenting opinion in this court: "The method of distribution of the surplus, whether it be called a dividend or not, has no bearing on the case." Whatever it was, "the stock of the subsidiary companies when issued and received by the testatrix became an independent asset of the estate, not in any way attached to or accompanying the original stock" and should be disposed of in accordance with the intent of the testatrix as shown by her will and codicil. (171 App. Div. 809.) The status of the distribution made by the Standard Oil Company clearly was not fixed and settled by the decision of the Court of Appeals in *Matter of Brann* (*supra*) as that of an extraordinary dividend, as is claimed by the counsel for the life beneficiaries. Nor do I find anything in the cases relied upon by the counsel for the life beneficiaries which is inconsistent with the views that I have expressed in this opinion.

In *Equitable Life Assurance Society v. Union Pacific R. R. Co.* (212 N. Y. 360) the Baltimore and Ohio Railroad stock was held merely as an investment of surplus. That road was

not a part of the plant of the Union Pacific, nor was it used to extend the facilities of the latter company. The sole benefit accruing to the Union Pacific from the stock holding was the receipt of dividends on the investment. The distribution of that stock was, therefore, a distribution of surplus that was properly applicable to dividends, and the fact that the distribution was made of the stock itself, rather than in cash that could have been obtained by the sale of the stock, made no difference. The court further recognized that special circumstances might take the case out of "the ordinary rule," which they applied in that case, "of corporate management established by decisions, statutes and business usages that the surplus of these gains or profits beyond what may be necessary to keep good the liability to capital stock which has been issued, may, *in the discretion of a board of directors, be distributed* amongst its stockholders as dividends and returns on their investment." (P. 366.)

In the instant case, as has been shown, special circumstances exist. The stock was purchased from a fund that the certificate of incorporation stated should not be appropriated in the payment of dividends, and the plants of the corporation were used in the business of the Standard Oil Company and were in effect an extension of its own plant and facilities.

In *Matter of Schaefer* (178 App. Div. 117; *affd.*, on opinion of SCOTT, J., 222 N. Y. 533) the surplus had been invested in leases of saloon properties and chattel mortgages on saloon fixtures and on such leases. This was not an investment of working capital in the plant and facilities of the corporation's business. The leases were not secured for the purpose of carrying on business by the corporation in the demised premises, but for the purpose of reletting to others, and the profit, if any, on the investment accrued in the increased rent received, and upon the mortgage loans the corporation received interest on the investment and nothing more. This court held that when the corporation purchased from the trustees the stock, the value of these investments was represented in the price paid for the stock and, in so far as the money so invested was accumulated during the trust period, it should go to the life beneficiaries, for it was taken from a fund



applicable to dividends, and which would have gone to them had it been so distributed.

*Matter of Rogers* (22 App. Div. 428; 161 N. Y. 108), while it dealt with the dissolution of a corporation and hence thus distinguishable in some particulars from the case at bar, is illuminating of points involved in the instant case and goes far to sustain the conclusion that I have reached. The Rogers Locomotive and Machine Works was started in 1838 with a small capital (\$300,000). From time to time its plant was increased, until it had large and valuable buildings and plant devoted to manufacturing purposes and an extensive stock of materials on hand. In addition, it had a large fund in cash, bonds and stocks of the United States government, bonds of other corporations, and real estate located in other States. All of the increases in plant and the purchasing of the securities had been made out of accumulated profits. In 1893 another corporation was organized called the Rogers Locomotive Company with an authorized capital of \$3,000,000. The old company transferred all its works, buildings, plant, stock on hand and good will for \$2,750,000 in the stock of the new company. Thereupon the original company proceeded to liquidate. The directors sold some of the securities and the real estate and from time to time made distribution. The stock in the new company was ratably distributed to the stockholders of the old, and a division in kind was made of the railroad stocks and cash dividends. Altogether there was distributed to the holder of each share of stock in the old company 1,144 per cent in the stock of the new company, 1,000 per cent in cash, and 175 per cent in railroad stock. The testator had died in 1868, creating a trust for certain life beneficiaries with a remainder over in certain shares of stock in the original company. A controversy arose between the life beneficiaries and the remaindermen. It was decided by the surrogate that the stock in the Rogers Locomotive Company was capital; that the cash dividends (except a part, as to which no appeal was taken) and the dividend of railroad stock were income. This decision was affirmed in the Appellate Division and the Court of Appeals. In the course of the opinion the latter court said (p. 113): "What then is capital and what is profits? In a manufacturing business a

plant is of first importance, and as the business increases an enlargement thereof, with the necessary tools, fixtures and machinery, is one of the things to which the earnings of the company may properly be devoted. This must be deemed to be fairly within the contemplation of the testator in creating the trusts with the capital stock of this company. After the plant, there arises a necessity for raw material and labor to manufacture it. This requires what is usually termed a working capital, and it, of necessity, varies in amount depending upon the magnitude of the business. It must, therefore, also have been within the contemplation of the testator that a reasonable amount would be retained by the directors for this purpose. The sale of the plant, as we have seen, included the stock of raw material on hand and that in the process of manufacture, and we must assume that the sum obtained from such sale included so much of the working capital as was necessary for the procurement of raw material. \* \* \* The appellants claim that all of the assets were necessary, but this we cannot admit. It is very clear that the investment in government bonds, railroad stocks, and lands in the western States was not capital employed in the business of the corporation, and, consequently, was not necessary as a working capital. \* \* \* We incline to the view that substantial justice has been done the parties by the order appealed from and that it should be affirmed."

In *Robertson v. de Brulatour* (188 N. Y. 301), while the cash distributed was realized in part from the sales of real estate no longer necessary in the company's business, it was held that the sale did not create the surplus nor affect it as an item in the account of assets and liabilities, but that the sales of real estate and securities to the extent that they were made assets, were liberated, and the cash accumulated was a cash surplus which the directors could, in the exercise of their discretion, distribute among the stockholders.

The case of *Williams v. Western Union Telegraph Co.* (93 N. Y. 162) was an action brought by a stockholder to restrain the company from issuing stock to purchase stock in certain other telegraph companies, and distributing a stock dividend. The counsel for the life beneficiaries quotes lengthily from pages 191 and 192 of the opinion. But as this case

dealt with the rights of directors to declare dividends, when questioned by a dissenting stockholder, there is nothing in it that throws any light on the consideration of the case at bar.

I have no quarrel with the portion of the opinion cited by my brother SHEARN from *Smith v. Dana* (77 Conn. 543, 554), although the holding in that case that stock dividends irrevocably fix the status of the surplus thus capitalized, and that such dividend goes to the capital of the trust, irrespective of the time when the surplus was accumulated, is contrary to the rule in this State. I do not question the right or the power of a majority of the directors of the Standard Oil Company to have abandoned these subsidiary companies and sold them, or to have distributed the fund reserved for working capital in cash, for such right was expressly given by the amended certificate of incorporation of the company. But by that certificate it was also provided that out of profits they might reserve a fund for working capital, and it was within their discretion to expend this money in the purchase or enlargement of the plant and facilities of the company, which they did directly and through the organization or purchase of other companies subsidiary and auxiliary to the corporation. The amended certificate provided that such property and such fund should not be applicable to or distributable as dividends, unless a majority of the directors or a majority of the stockholders so voted.

In my opinion, until such action, the investment is and must be deemed to be a capital investment, and when without such vote the stock of the subsidiary companies under consideration herein was transferred to the stockholders, it was a distribution not of surplus, not by way of dividend, but of an aliquot part of the capital assets of the corporation, of which theretofore they had been the equitable owners and thereby became the legal owners. Therefore, when the trustees received this stock it was their duty to hold it as a part of the capital of the trust estate, paying over to the life beneficiaries the income therefrom, which theretofore had been received and paid over as a part of the dividends of the Standard Oil Company, but which now is paid directly from the subsidiary company to the trustee. The removal of an intermediate conduit through which the income had been received has not,

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in my opinion, changed the whole character of the stock holding.

To my mind this works not alone substantial justice, but gives effect to the intention of the testator and is entirely in harmony with the controlling principle of *Matter of Osborne* (209 N. Y. 450). We have held in *Baker v. Thompson* (181 App. Div. 469), decided herewith, that the rules in that case are applicable to a distribution of surplus of the corporation by dividend or otherwise, but not to capital assets. That there may be large accretions of capital by increase of plant and facilities which, although paid for out of income, are not distributable as dividends, and which when paid to a trustee become a part of the capital of the trust, was distinctly held in *Matter of Rogers* (*supra*), and was declared by the court to work substantial justice and to give effect to the intention of the testator — which was that the income should go to the life beneficiary, but that the principal should go to the remaindermen. In the instant case, by the result which, in my opinion, should be adopted, the parties would be left exactly in the position they have been. The income from these subsidiary stocks would be paid to the life beneficiaries by the trustees, who will receive it directly from the subsidiary companies, instead of in the form of dividends from the Standard Oil Company, and the stock of the subsidiary companies will be held by the trustees instead of by the Standard Oil Company. The rule in the *Osborne* case was adopted to prevent the appropriation by the life beneficiary of accretions to capital which had resulted from income received and not distributed prior to the creation of the trust. It should not be applied to allow the appropriation by the life beneficiary of other legitimate accretions to capital after the creation of the trust. The book value of the stock at the time of the creation of the trust is not to be adopted as the fixed value of the capital, which cannot thereafter be increased in any manner whatsoever.

For the reasons above given, I am of opinion that these shares of stock in the Colonial Oil Company, the Standard Oil Company of California, and the Standard Oil Company of Nebraska, should be held as a part of the capital of the trust, and not distributed in whole or in part to the life beneficiaries.

DOWLING, J. (dissenting):

There is no dispute as to the facts herein, which are set forth in detail in the report of the referee. So far as they are material to these appeals, they may be summarized as follows:

Charles F. G. Heye died on February 8, 1899, leaving a will which was admitted to probate on February 17, 1899. He left surviving him his wife, Marie Antoinette Heye, to whom letters testamentary were issued, and two children — Marie Antoinette Lawrence Heye (now Marie Heye Clemens) and George Gustav Heye. By his will he gave his residuary estate to the United States Trust Company of New York as trustee and directed that it be divided into three equal parts. The trustee was to pay and apply the net income of one part to the use of his wife, Marie Antoinette Heye, during her life; the principal was to go to such persons as she might appoint by will, and in default of appointment to his children in equal shares. The net income of one part was to be applied to the use of testator's daughter, Marie Antoinette Lawrence Heye, during her life, and upon her death leaving issue the principal was to go to such issue *per stirpes*. Her children now living are the infant defendants Dorothy Heye Clemens and Marie Antoinette Wagener Clemens. The net income of the third part was to be applied to the use of testator's son, George Gustav Heye, until he should reach twenty-eight years of age. On his reaching that age \$150,000 was to be paid over to him and the balance held in trust until he should be thirty; then all of this balance except \$100,000 was to be paid over to him and the balance (\$100,000) was to remain in trust for him and the income to be applied to his use for the rest of his life. On his death all of the share of the residuary estate then held in trust for him was given to his issue. He attained the age of twenty-eight on September 16, 1902, and the age of thirty on September 16, 1904. His children now living are the infant defendants Mildred Agnes Heye and Lawrence William Heye.

Marie Antoinette Heye, the widow of the testator, died on the 18th day of February, 1915, leaving a will by which she exercised the power of appointment given her by the will of her husband and directed that the trustee should continue to hold one-half of the property, subject to such

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power in trust, during the life of Marie Heye Clemens, paying the net income to her use; and on her death it should pay over the principal to such persons as she might appoint by will, and, in default of appointment, to her issue; and she further directed that the trustee should continue to hold the other one-half of said property during the life of George Gustav Heye, paying the net income to his use and on his death it should pay over the principal as he might appoint by will, and, in default of appointment, to Marie Heye Clemens, or to her issue.

The plaintiff on May 10, 1899, received from Marie Antoinette Heye, the executrix of the will of Charles F. G. Heye, certificates for shares and fractional shares of stock in twenty companies whose stocks were distributed by the trustees of the Standard Oil Trust subsequent to the dissolution of the trust in 1892, as follows:

	Shares.	Fractional shares.
Anglo-American Oil Co., Limited...	98	895000/972500
The Atlantic Refining Co.....	190	225000/972500
The Buckeye Pipe Line Co.....	760	900000/972500
Eureka Pipe Line Co.....	190	225000/972500
Forest Oil Company.....	209	247500/972500
Indiana Pipe Line Co.....	76	90000/972500
National Transit Co.....	1,936	924800/972500
New York Transit Co.....	190	225000/972500
Northern Pipe Line Co.....	38	45000/972500
The North Western Ohio Nat. Gas Co.	124	714500/972500
The Ohio Oil Co.....	304	360000/972500
The Solar Refining Co.....	19	22500/972500
Southern Pipe Line Co.....	190	225000/972500
South Penn Oil Co.....	95	112500/972500
Standard Oil Co. (Indiana).....	38	45000/972500
Standard Oil Co. (Kentucky).....	38	45000/972500
Standard Oil Co. (New Jersey).....	380	450000/972500
Standard Oil Co. of New York.....	266	315000/972500
Standard Oil Co. (Ohio).....	133	157500/972500
Union Tank Line Co.....	133	157500/972500

The certificates above mentioned represented the equivalent of \$370,000 par value of so-called Standard Oil Trust certi-

cates which had been owned by the testator and surrendered by him to the trustees of the Standard Oil Trust pursuant to a plan to dissolve the said trust. The Standard Oil Trust had been created by agreements dated January 2 and 4, 1882, by which the stock of certain companies theretofore held by certain individuals and corporations for common account were transferred to certain persons as trustees who issued certificates of beneficial interest therein to the beneficial owners of said stocks.

Upon the dissolution of the trust a majority of the stocks held by the trustees in the twenty companies above named were distributed ratably to the holders of the trust certificates as fast as they surrendered their trust certificates or made application for their distributive shares of stock. Slightly less than a majority of the holders of the trust certificates did not surrender or make application for their distributive shares until after the Standard Oil Company (New Jersey) in 1899 adopted the resolution hereinafter mentioned. Meanwhile the stocks of the companies which had been distributed were not dealt in separately but the unit of trading was the proportionate interest in the several companies either equivalent to or represented by trust certificates, the result of which was that at all of the times mentioned the proportionate interest of the stockholders in each of the twenty companies remained the same as though the trust had not been dissolved.

In the year 1899 the capital stock of the Standard Oil Company (New Jersey), one of said corporations above named, was increased from 100,000 shares of the par value of \$10,000,000 to 1,100,000 shares of the par value of \$110,000,000, of which 1,000,000 shares were common stock and 100,000 shares were preferred stock, the stock previously outstanding being converted into preferred stock, and the officers of that corporation were duly authorized to issue said certificates of common stock in purchase of the stock of the remaining nineteen of said corporations and its own preferred stock at the rate of one share of such common stock for shares or various fractional shares of the stock of such other corporations and of its preferred stock, and the plaintiff on or about August 11, 1899, surrendered to the said Standard Oil Company (New Jersey) the said certificates of stock of the

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said twenty corporations above mentioned and received in exchange therefor 3,700 shares of the common stock of the Standard Oil Company (New Jersey).

The plaintiff in dividing said residuary estate of Charles F. G. Heye into three equal parts as directed by his will allotted 1,234 shares of the said common stock of the Standard Oil Company (New Jersey) to the trust created by the will of said Charles F. G. Heye for the benefit of Marie Antoinette Heye, and 1,233 shares of said stock to the trust created for the benefit of Marie Antoinette Lawrence Heye, now the defendant Marie Heye Clemens, and 1,233 shares of said stock to the trust created for the benefit of George Gustav Heye. As trustee for Marie Antoinette Heye it has ever since held and continues to hold the 1,234 shares of the stock of the Standard Oil Company (New Jersey), allotted as aforesaid to the trust created for her benefit; and as trustee for the benefit of Marie Heye Clemens it has ever since held and continues to hold the 1,233 shares of said stock allotted as aforesaid to the trust created for her benefit; but as trustee for the benefit of George Gustav Heye, it had, prior to the 1st day of September, 1911, duly disposed of all of the 1,233 shares of stock allotted as aforesaid to the trust created for his benefit, with the exception of 47 shares, and on September 1, 1911, it held as such trustee 47 shares of stock, which it has since continued to hold.

The aggregate amount of common stock issued by the Standard Oil Company (New Jersey) between 1899 and December 1, 1911, in exchange for stocks of the other nineteen corporations and its own preferred stock as aforesaid and also in acquiring additional shares of certain other corporations was 983,383 shares. All its preferred stock had been retired by the last-mentioned date.

In 1906 the United States brought suit under the Sherman Law (26 U. S. Stat. at Large, 209, chap. 647) against the Standard Oil Company (New Jersey), the companies whose stocks had been acquired by it by the issue of its own stock in exchange therefor as aforesaid and against a number of other companies whose stocks had been acquired by the Standard Oil Company (New Jersey) or its subsidiary companies at other times and against various individuals.



(*United States v. Standard Oil Co.*, 173 Fed. Rep. 177.) This suit, after an appeal to the United States Supreme Court from the decree originally entered, resulted ultimately in a final decree entered in 1911 in the United States Circuit Court for the Eastern Judicial District of Missouri. This decree adjudged that the Standard Oil Company (New Jersey) and other companies enumerated in section 2 of said decree had entered into and were carrying out a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several States, in the territories and with foreign countries, and were monopolizing a substantial part of such commerce, all in violation of the so-called Sherman Law. The decree further declared that the stocks of the various corporations so named in section 2 were held by the Standard Oil Company (New Jersey) by virtue of such an illegal combination and it accordingly enjoined the Standard Oil Company (New Jersey), its directors, officers, etc., from voting any of the stock in any of said subsidiaries and from exercising or attempting to exercise any control, direction, supervision or influence over the acts of these subsidiaries by virtue of its holding of their stock. This decree in section 5 thereof thereupon continues as follows: "And these subsidiary companies, their officers, directors, agents, servants and employees are, and each of them is, enjoined and prohibited from declaring or paying any dividends to the Standard Company on account of any of the stock of these subsidiary companies held by the Standard Company, and from permitting the latter company to vote any stock in, or to direct the policy of, any of said companies, or to exercise any control whatsoever over the corporate acts of any of said companies by virtue of such stock, or by virtue of the power over such subsidiary corporations acquired by means of the illegal combination. But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination."

On appeal to the Supreme Court of the United States the decree of the Circuit Court was affirmed on May 15, 1911 (*Standard Oil Co. v. United States*, 221 U. S. 1), with

the modifications, (1) that in view of the magnitude of the interests involved and their complexity, the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months; and (2) that in view of the possible serious injury which might result to the public from an absolute cessation of interstate commerce in petroleum and its products, by such vast agencies as those embraced in the combination, the defendants should not be enjoined from engaging or continuing in commerce among the States or in the territories of the United States for a similar period of six months. This period of six months dated from June 21, 1911. The provisions of the decree in question, while not making it compulsory, left it open to the Standard Oil Company (New Jersey) to distribute ratably to its stockholders the shares of the corporations adjudged to have been parties to the illegal combination. Accordingly the board of directors of the Standard Oil Company (New Jersey) on July 28, 1911, adopted the following resolutions:

“WHEREAS, to execute and carry into effect the final decree in the case of the United States of America against the Standard Oil Company (of New Jersey) and others, it is necessary to distribute ratably to the stockholders of this Company the shares of stock of various corporations mentioned and described in such decree, owned by this Company either directly or through its ownership of stock of the National Transit Company, which corporations are as follows [here follow the names of the thirty-three corporations whose stocks were distributed].

“*Resolved*, that the shares of stock of each of said corporations owned by this Company be distributed ratably to the stockholders of this Company of record on the first day of September, 1911, and that the shares of stock of the Cumberland Pipe Line Company and the Prairie Oil and Gas Company to which this Company will be entitled upon the distribution thereof by the National Transit Company to its stockholders, be likewise distributed ratably to the stockholders of this Company of record on the first day of September, 1911.

“*Resolved*, that the National Transit Company be, and it hereby is authorized and requested to distribute ratably

to its stockholders of record on the first day of September, 1911, the shares of stock of the Cumberland Pipe Line Company and of the Prairie Oil & Gas Company which it owns, and to make in connection therewith such reduction in its capital stock as may be rendered necessary by such distribution."

The distribution so ordered was made and the shares of the thirty-three enumerated corporations were accordingly distributed ratably to the stockholders of the Standard Oil Company (New Jersey). Plaintiff received certain of these stocks as trustee (1) of the trust for the benefit of Marie Antoinette Heye; (2) of the trust for the benefit of Marie Heye Clemens; (3) of the trust for the benefit of George Gustav Heye. The factor of division being 983.383, there were fractional shares of the stock of each corporation assigned to the respective funds. Omitting these fractions, the shares received from the trust for the benefit of Marie Antoinette Heye were as follows:

- 1,234 shares Anglo-American Oil Company, Ltd.
- 62 shares Atlantic Refining Company.
- 2 shares Borne Scrymser Company.
- 250 shares Buckeye Pipe Line Company.
- 3 shares Chesebrough Manufacturing Company.
- 3 shares Colonial Oil Company.
- 3 shares Continental Oil Company.
- 75 shares Crescent Pipe Line Company.
- 12 shares Cumberland Pipe Line Company, Inc.
- 62 shares Eureka Pipe Line Company.
- 21 shares Galena Signal Oil Company, preferred.
- 70 shares Galena Signal Oil Company, common.
- 125 shares Indiana Pipe Line Company.
- 638 shares National Transit Company.
- 62 shares New York Transit Company.
- 50 shares Northern Pipe Line Company.
- 752 shares Ohio Oil Company.
- 225 shares Prairie Oil and Gas Company.
- 6 shares Solar Refining Company.
- 125 shares Southern Pipe Line Company.
- 31 shares South Penn Oil Company.
- 43 shares South West Pennsylvania Pipe Lines.

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- 313 shares Standard Oil Company (California).
- 12 shares Standard Oil Company (Indiana).
- 12 shares Standard Oil Company (Kansas).
- 12 shares Standard Oil Company (Kentucky).
- 7 shares Standard Oil Company (Nebraska).
- 188 shares Standard Oil Company of New York.
- 43 shares Standard Oil Company (Ohio).
- 1 share Swan & Finch Company.
- 150 shares Union Tank Line Company.
- 31 shares Vacuum Oil Company.
- 8 shares Washington Oil Company.
- 3 shares Waters-Pierce Oil Company.

The trust estate for the benefit of Marie Heye Clemens received 1,233 shares of the Anglo-American Oil Company, Ltd., and proportionate amounts of all the other stocks. The trust estate for the benefit of George Gustav Heye received 47 shares of Anglo-American Oil Company, Ltd., and proportionate amounts of all the other stocks. The certificates representing the trustee's shares in these corporations other than the Anglo-American Oil Company, Ltd., were received by the trustee on or about December 1, 1911, and the stock of the Anglo-American Oil Company, Ltd., in January, 1912.

The thirty-three corporations whose shares were so distributed by the Standard Oil Company (New Jersey) comprised shares in seventeen out of the nineteen corporations whose shares were acquired by the Standard Oil Company (New Jersey) in 1899. The Forest Oil Company, one of the remaining two corporations, had been absorbed by the South Penn Oil Company in 1902, and the stock of the North Western Ohio Natural Gas Company was not directed to be distributed by the above resolution. The remaining sixteen corporations whose stocks were so distributed comprised the following:

Eight companies whose stocks were owned by the Standard Oil Company (New Jersey) in 1899 and prior to the testator's death as follows:

- Borne Scrymser Company,
- Chesebrough Manufacturing Company,
- Continental Oil Company,
- Galena Signal Oil Company (representing the consolidation of Galena Oil Company and Signal Oil Company),

Standard Oil Company (Kansas),  
Swan & Finch Company,  
Vacuum Oil Company,  
Waters-Pierce Oil Company.

Three companies whose stocks had been acquired by the Standard Oil Company (New Jersey) out of its cash earnings subsequently to 1899, as follows:

Colonial Oil Company,  
Standard Oil Company (California),  
Standard Oil Company (Nebraska).

Two companies whose stocks were acquired by the Standard Oil Company (New Jersey) subsequently to December, 1899, from its subsidiaries as follows:

South West Pennsylvania Pipe Line Company,  
Washington Oil Company,  
Crescent Pipe Line Company.

Two companies whose stocks were distributed by the National Transit Company in 1911 pursuant to the above resolution:

Cumberland Pipe Line Company.  
Prairie Oil and Gas Company.

In the case of some of the subsidiary corporations whose stocks were acquired by the Standard Oil Company (New Jersey) in 1899 in exchange for its common stock, or were theretofore held by it, its holdings were increased therein between 1899 and 1911 by its purchase of increases of capital stock of such subsidiaries issued for cash at par, and through stock dividends declared and paid by them. Thus the Standard Oil Company (New Jersey) had between 1899 and 1911 bought for cash at par out of its own earnings stock in eleven subsidiary companies of the aggregate par value of \$60,650,000, which it carried on its own books at an aggregate book value of \$71,503,765 as of December 1, 1911, and which the subsidiary companies carried on their books as of an aggregate book value of \$127,237,375 on December 31, 1911. These companies were: Anglo-American Oil Company, Colonial Oil Company, Crescent Pipe Line Company, Northern Pipe Line Company, Ohio Oil Company, Southern Pipe Line Company, Standard Oil Company of California, Standard Oil

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Company of Kansas, Standard Oil Company of Nebraska, Standard Oil Company of New York and Union Tank Line Company. Stock dividends were also declared and paid to the Standard Oil Company (New Jersey) by certain of the subsidiaries (Crescent Pipe Line Company, Indiana Pipe Line Company, Northern Pipe Line Company, Southern Pipe Line Company, and Vacuum Oil Company) between 1899 and 1911, of the par value of \$12,975,000, whereof the book value on December 1, 1911, according to the books of the Standard Oil Company (New Jersey) was \$18,367,870, and whereof the book value on December 31, 1911, according to the books of the subsidiary companies was \$26,330,837. The book value on the books of the Standard Oil Company (New Jersey) at which the stocks distributed on December 1, 1911, and the Anglo-American Oil Company, Ltd., stocks were carried, was \$280,121,948.62. These distributions were entered on the company's journal vouchers as follows:

## "JOURNAL VOUCHER.

" No. 217

NEW YORK, *December 1st, 1911.*

" Charge.

" Reserved Profits

" To distribute ratably to stockholders of record Sept. 1st, 1911, the stocks owned and held by this Company as per attached list in accordance with the opinion and order of the Supreme Court of the United States, May 15th, 1911, and resolution of Board of Directors, July 28th, 1911..... \$268,856,501 00

" Credit

" Sundry Stock Accounts as per attached

list..... \$268,856,501 00

" Approved,

" Entered

(Signed)

C. G. FAY,

" Jour. Folio 87.

*Assistant Comptroller."*

## "JOURNAL VOUCHER.

" No. 17

NEW YORK, *Jan'y. 20th, 1912.*

" Charge

" Reserved Profits

" To distribute to stockholders of record Sept. 1st, 1911, in accordance with the opinion and order of the

Supreme Court of the United States May 15th, 1911,  
and Resolution of Board of Directors July 28th,  
1911, Stock of Anglo-American Oil Co. Lim., on basis  
of One (1) Share Warrant of £1. for each share of  
Standard Oil Co..... \$11,265,447 57

“ Credit

“ Anglo-American Oil Co. Limited, Share

Warrants, 983,383 Share Warrants... \$11,265,447 57

“ Approved,

“ Entered (Signed) C. G. FAY,

“ Jour. Folio 7. *Assistant Comptroller.*”

Whenever the stock of any of the subsidiary companies was increased, subsequently to 1899, and the increase or any part thereof was issued for cash to the Standard Oil Company (New Jersey), the entry on the books of the latter company was a charge to the stock investment account of the company affected and a credit to the cash account of the Standard Oil Company (New Jersey) for the amount of the disbursement. If such increased stock or part thereof was distributed as a stock dividend and received by the Standard Oil Company (New Jersey), the entry on the Standard Oil Company (New Jersey) books was a charge to the corresponding stock investment account and a credit to the profit and loss account of the investment in the stock of the company making the stock distribution. The Standard Oil Company (New Jersey) down to the year 1906 carried a profit and loss account with each stock investment in a subsidiary company, which represented the New Jersey company's proportion of the surplus or undivided profits of the subsidiary company not paid to the New Jersey corporation dividends.

On November 20, 1902, the balance standing to account of surplus on the books of the Standard Oil Company (New Jersey) was transferred to “ reserve profits account ” and since November 20, 1902, all earnings in excess of the amount required to pay dividends have been transferred to reserve profits. The cash earnings of the Standard Oil Company (New Jersey) between January 1, 1899, and December 1, 1911, from its own business and cash dividends from all subsidiaries (not including cash earnings accumulated but not distributed by subsidiaries) exceeded the dividends paid by the Standard Oil

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Company (New Jersey) during said period by \$328,691,788.13, which is over \$48,000,000 more than the amount at which the stock distributed on December 1, 1911, was then carried on the books of the Standard Oil Company (New Jersey).

The book value per share of the stock of the Standard Oil Company (New Jersey) on December 31, 1899, was \$202.32.

Before the distribution of December 1, 1911, accumulated earnings had brought this book value up to \$566.57.

After this distribution the book value was \$281.72 per share.

On February 15, 1913, the Standard Oil Company (New Jersey), pursuant to resolution of its board adopted on February third, paid a cash dividend of forty per cent to stockholders of record at the close of business on February 7, 1913. The preamble to the resolution referred to this distribution as arising from the collection of large sums of money which had been owing by the former subsidiaries of the Standard Oil Company (New Jersey) at the time of the distribution in 1911 and which had since been collected into the treasury of the Standard Oil Company (New Jersey).

The book value of the stock of the Standard Oil Company (New Jersey) before this forty per cent distribution was \$289.89 and after such distribution was \$249.89.

This distribution, like the distribution of stocks in 1911, was charged to reserve profits.

The journal vouchers in reference to this dividend were as follows:

“ JOURNAL VOUCHER 79.

“ NEW YORK, *February 15th*, 1913.

“ Received

“ from

Standard Oil Company,  
(New Jersey)

“ Check to order of National City Bank  
for credit to Standard Oil Co. (N. J.)

Dividend Account..... \$39,335,320 00

“ For amount of Dividend Checks No. 1 to No. 6090,  
inclusive, on National City Bank this day to cover  
distribution of \$40.00 per share on 983,383 shares

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Common Stock of this Company as per resolution of Directors Feby. 3d, 1913.

" For account of Dividends Paid

" (General Ledger)

" (Signed)

C. G. FAY,

" *Asst. Comptroller.*

" JOURNAL VOUCHER.

" Under date of Dec. 31, 1913.

" NEW YORK, Feby. 19th, 1914.

" No. 1019

" Charge

" Reserved Profits . . . . . \$39,335,320 00

" Credit

" Dividends paid

" For distribution February 15th

1913, transferred . . . . . \$39,335,320 00

" Approved

" Entered

(Signed)

C. G. FAY,

" Jour. Folio 205.

*Comptroller."*

At the time of this distribution the Standard Oil Company (New Jersey) had issued and outstanding 983,383 shares of common stock and no preferred stock, and its net assets just prior thereto were \$285,074,538.54.

The amount received by the plaintiff as trustee upon the cash distribution by the Standard Oil Company (New Jersey) has been paid over to the life beneficiaries as income during the pendency of this action without objection on the part of the trustees or the remaindermen.

Between the date of the distribution of December 1, 1911, and the entry of the judgment in this action, stock dividends and extraordinary cash dividends were declared and paid and rights to subscribe for increases of capital stock at par were offered to stockholders by a number of the former subsidiaries of the Standard Oil Company (New Jersey) whose stocks had been distributed in December, 1911, as follows:

The following companies declared and paid stock dividends:

Anglo-American Oil Company, November 26, 1913, 100 per cent stock dividend.

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Galena Signal Oil Company, May 15, 1913, 50 per cent stock dividend.

Solar Refining Company, June 30, 1913, 300 per cent stock dividend.

South Penn Oil Company, July 31, 1913, 300 per cent stock dividend.

Standard Oil Company (Indiana), May 15, 1912, 2,900 per cent stock dividend.

Standard Oil Company (Kansas), June 30, 1913, 100 per cent stock dividend.

Standard Oil Company (Nebraska), April 25, 1912, 33 $\frac{1}{2}$  per cent stock dividend.

Standard Oil Company (Nebraska), June 30, 1913, 25 per cent stock dividend.

Standard Oil Company (New York), June 30, 1913, 400 per cent stock dividend.

Standard Oil Company (California), May 1, 1916, 50 per cent stock dividend.

A stock dividend amounting to 100 per cent was declared by the Standard Oil Company (Ohio) on May 26, 1916, but had not been paid on the date of the plaintiff's last supplemental account in this action. The judgment as entered directs the disposition to be made of this stock dividend when received.

The following companies offered to stockholders rights to subscribe for additional stock at par:

South Penn Oil Company, July 31, 1913, 100 per cent at par.

Standard Oil Company (California), August 31, 1913, 80 per cent at par.

Standard Oil Company (California), February 2, 1914, 45,183 shares at par.

Standard Oil Company (Kentucky), February 14, 1914, 200 per cent at par.

The Kentucky company at the same time declared a cash dividend of 200 per cent, which was expressly made applicable to payment of the subscription rights.

Swan & Finch Company, August 21, 1912, 400 per cent at par.

Vacuum Oil Company, February 29, 1912, 500 per cent at par.

The following company declared a cash dividend:

Solar Refining Company, December 20, 1913, thirty dollars a share.

Two companies distributed stock of other corporations:

Ohio Oil Company, February 1, 1915, distributed stock of Illinois Pipe Line Company.

Prairie Oil and Gas Company, March 22, 1915, distributed stock of Prairie Pipe Line Company.

The plaintiff, as trustee of the three trusts under the will of Charles F. G. Heye, deceased, received in each case the stock or extraordinary cash dividend so declared and paid in respect to the shares of the stock of the corporation declaring the same theretofore received by the plaintiff upon the distribution of December, 1911. It exercised the right offered to it to subscribe for 200 per cent of the stock held by it in the Standard Oil Company (Kentucky) using for that purpose the cash dividend which by resolution of the company was made expressly applicable to the payment of such stock. In the case of the remaining subscription rights the trustee either sold them for cash or exercised them, paying in the latter event for the additional stock out of the principal of the trust, and in the case of the South Penn Oil Company exercised in part and sold in part the subscription rights offered by resolution of July 31, 1913, by said company.

By the judgment appealed from it is determined that the shares distributed by the Standard Oil Company (New Jersey) in December, 1911, did not constitute a distribution of undivided profits, or of surplus assets in any form, as dividends from earnings of capital, and are not income, rents, issues and profits of the trust estates payable to the life beneficiaries under the will of Charles F. G. Heye, deceased, but that the same accrued to and constitute part of the principal of the trust estates.

It was further adjudged that the stock dividends, cash dividends (other than ordinary dividends) and stock subscription rights declared and offered subsequently to December 1, 1911, by the former subsidiary companies of the Standard Oil Company (New Jersey) were when received by the plaintiff or (in respect to subscription rights) exercised by the plaintiff subject to apportionment between capital and income

of the respective trusts, according to certain rules therein laid down, as follows:

“(a) Where shares of the company declaring the dividend or offering the rights were received by the trustee at the time of the establishment of the trusts and were exchanged for the stock of the Standard Oil Company (New Jersey); or where the stock of such company was then held by the Standard Oil Company (New Jersey), or one of its subsidiary companies, the book value to be maintained in the capital of the trust funds should be computed as of May 10, 1899, the date of the establishment of the trusts.

“(b) Where shares of the company declaring the dividend or offering the rights were not held in the trusts at the time they were established and the stock of such company was not then held but was subsequently acquired by the Standard Oil Company (New Jersey), or one of its subsidiary companies, the book value to be maintained in the capital of the trust funds should be computed as of the date of such acquisition.

“(c) In any case in which the capitalization of any of the subsidiary companies was increased between the date of the establishment of the trusts, or the first acquisition of the stock by the Standard Oil Company (New Jersey), or one of its subsidiary companies, and the date of the distribution in December, 1911, such stock increases should be deemed, for the purposes of the apportionment herein directed, to have become in due proportion a part of the several trust funds as, and when, the stock increases were so respectively acquired by the Standard Oil Company (New Jersey) or one of its subsidiary companies; and the book values of the several portions of such stocks so added to the capitalization of such company should be computed as of the respective dates of such acquisition of the stock and an average book value ascertained as that to be maintained in the capital of the trust funds; and subscription rights, if exercised, or the proceeds, if sold, should be apportioned on the same basis.”

These rules are then, by the judgment, applied to the particular facts as found.

As appellants the life beneficiaries appeal from the judgment in so far as it adjudges that the shares received by the trustee

upon the distribution of 1911 constitute part of the principal of the respective trusts, and in so far as it adjudges that any of the subsequent dividends or subscription rights (or proceeds thereof) constitute principal. Their contention is that the distribution of 1911 charged on the company's books to reserve profits is in fact such a distribution of profits; that this distribution is an extraordinary distribution within the meaning of the rules of apportionment laid down in *Matter of Osborne* (209 N. Y. 450, 477), and that under the rules there laid down the life beneficiaries are entitled to the whole of such distribution since in the case at bar the surplus of the company has during the trust period increased through earnings (not including any unearned increment, increased value of real estate, unrealized market or paper profits, etc.) to such an extent that the distribution when made may be awarded to the life beneficiaries without impairing the book value of the trust investment as of the date of the commencement of the trust.

If the shares received by the trustee upon the distribution of 1911 are thus adjudged to the life beneficiaries from the date of their receipt by the trustee the life beneficiaries are, of course, also entitled to all subsequent dividends, distributions and subscription rights accruing upon such shares.

The life beneficiaries, however, claim further that they are entitled to the whole of such subsequent dividends, distributions and subscription rights irrespective of the ultimate decision in reference to their rights to the shares received by the trustee upon the 1911 distribution of the Standard Oil Company (New Jersey).

As respondents upon the appeals taken by the trustee and the remaindermen, the contention of the life beneficiaries is, that the judgment as entered, although giving them less than their rights, is correct so far as it goes, and that the proportion of the extraordinary dividends and subscription rights awarded thereby to the life beneficiaries is, from any point of view, the minimum of their rights.

As appellants, the trustee and the remaindermen contend that the rights to subscribe pertaining to stocks constituting part of the principal of the trusts were principal and are not subject to apportionment between the life beneficiaries

and the principal of the trust funds, nor are rights to subscribe, coupled with a cash dividend, equivalent to a stock dividend and subject to a like apportionment. They further contend that the stocks distributed by the Standard Oil Company were acquired by the trust estates at the time of the distribution and must be kept good as of that time as though they had been purchased with funds constituting part of the principal of the estate. The referee held that the interest of the trust estates in the distributed stocks antedated their distribution and that the value to be kept good in the case of each stock is the value of the trust estate's *pro rata* equitable interest therein at the time the trust was established (if it was the stock of one of the twenty companies or was then held by one of the twenty companies), or at the time it was acquired by the Standard Oil Company (New Jersey) (if it was so acquired after the establishment of the trust). In those cases where the holdings of the Standard Oil Company of stock in a company were increased from time to time prior to distribution, the referee held that the trust estate's *pro rata* equitable interest in each lot acquired was to be kept good as of the time of its acquisition. The trustee further contends that in the case of stock dividends not required to keep good the principal of the trust, the life beneficiaries are not entitled to the stock itself, but only to the book value of the stock, and that the trustee on paying over such book value to the beneficiary, may retain the stock as principal.

As respondents, the trustee and remaindermen contend that the learned referee was correct in his holding as to the effect of the distribution of 1911, but that even if his position on that point is not sustained, the stock that the trustee turned over to the Standard Oil Company (New Jersey) in 1899 in exchange for the stock of the latter corporation, and which they received back from the Standard Oil Company (New Jersey), must be regarded as principal of the trust.

Taking up for consideration, in the first place, the appeal of the life beneficiaries, I am of opinion that the learned referee was in error in holding that the distribution of 1911 "was not a distribution of undivided profits, or of surplus

assets in any form, as dividends from earnings from capital," and the shares distributed thereunder "were not, when received by the plaintiff, income, rents, issues or profits of the trust estates, payable to the life beneficiaries under the will of Charles F. G. Heye, but accrued to the principal of the trust estates." I believe that this question is determined by the decision of the Court of Appeals in *Matter of Brann* (219 N. Y. 263). That case involved the construction of the will and codicil of Alice V. Leavitt. The will was made in 1908. After a specific legacy, it created a trust for the annual payment of \$600 to a brother for life, with remainder to charities. The subject of the trust was described by the testatrix as "the 30 shares of stock of the Standard Oil Co. owned by me." These shares then constituted the bulk of her estate. All the rest, residue and remainder of the estate, "including any legacy which may lapse or be void," she gave to her friend, Mrs. Johnston. The brother died in April, 1911, prior to the distribution in question by the Standard Oil Company (New Jersey) of the stocks of the subsidiary company. Nine months after such distribution (in September, 1912) the testatrix made a codicil. Her brother was then dead; the shares of the subsidiary companies were already in her hands; and by her codicil she gave money legacies amounting to \$1,700 to friends and charities, and disposed of a picture. "In all other respects," she provided, "I do hereby ratify and confirm my said will." Three months later she died. The question presented for determination was whether the shares in the thirty-nine subsidiary companies passed as part of the original shares, or stood separate and by themselves and passed to the residuary legatee. In the discussion of the question the status of the shares distributed was discussed at length by the court, and became relevant to the decision. It was a question presented by the briefs of the respective counsel upon the appeal and had been discussed in both the prevailing and the dissenting opinion in this court (171 App. Div. 800). Judge CARDOZO, in his opinion, first disposed of the argument (again advanced on this appeal) that the distribution of the stocks in the subsidiary companies by the Standard Oil Company (New Jersey) was compulsory. He said: "In December of the same year

[1911], the Standard Oil Company of New Jersey distributed among its stockholders the shares which it held in a large number of subsidiary oil companies. It did this under the compulsion of a decree of the United States Supreme Court by which it was required to dispose of its holdings in corporations under its control. The decree did not compel it to distribute the holdings among its own stockholders. It might have sold the shares and distributed the money, or even kept the money in its treasury. It elected, however, to distribute the shares in kind." (*Matter of Brann*, 219 N. Y. 263, 266.) The court then proceeded to consider the main question involved and in so doing held that there was no substantial identity between this extraordinary dividend distributed by the Standard Oil Company (New Jersey), consisting of the stocks in the subsidiary companies, and the shares upon which the dividend was paid, thus answering a contention again advanced upon this appeal, that the distributed stocks, together with the stock of the New Jersey company (representing the undistributed assets), merely represented the shares of the New Jersey company as they were prior to the distribution, and that as the New Jersey stock formed part of the capital of the trust in question, the stocks substituted for it as the result of the distribution likewise form part of the capital of the stock. Judge CARDOZO proceeded to say: "It is true that the gift of the thirty shares is a specific legacy, and that a specific legacy will be construed in the light of the situation existing when it was made (*Matter of Delaney*, 133 App. Div. 409; 196 N. Y. 530). But it is also true that unless the subject of a specific legacy exists, unchanged in substance, at the date of the will, there results an ademption, complete or partial according to the facts. In strictness, there has been in this case no ademption at all, for the thirty shares, which were the subject of the legacy, exist; but since the subsidiary shares, while held by the parent company, helped to give the primary shares their value, the analogy of ademption becomes useful. *Slater v. Slater* (L. R. [1 Ch. 1907] 665) states the controlling principle, and applies it to a situation similar to the one at hand. The principle is that a change in the nature of the property works an ademption unless it is a change 'in name or form only'



(*Slater v. Slater*, *supra*, at pp. 671, 672, quoting *Oakes v. Oakes*, 9 Hare, 666, 672. See, also, *Norris v. Harrison*, 2 Maddocks, 268). It may be that where the change is merely formal, as where a company is reorganized and there is a reissue of the shares, the identity of the gift will be held to be substantially preserved (*Mallam v. McFie*, L. R. [1 Ch. 1912] 29; *Turner v. Leeming*, L. R. [1 Ch. 1912] 828), but that is not this case. Here the original shares remain intact, and there is no contest about them. The new shares are, in effect, an extraordinary dividend declared during the life of the testatrix (*Brundage v. Brundage*, 60 N. Y. 544; *Equitable Life Assurance Society v. Union Pacific R. R. Co.*, 212 N. Y. 360). The case stands the same as if the Standard Oil Company had sold the shares, and distributed the proceeds. It is hardly denied that a voluntary dividend, whether paid in money or in stock, would be separate from the primary shares. The argument is that a different rule is applicable here because the dividend was compulsory. But the suggested distinction is inadequate. It was once thought that ademption was dependent on intention, and 'it was, therefore, held in old days that when a change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years, that has ceased to be law' (*Slater v. Slater*, *supra*, at p. 671). It has ceased to be law in England (Jarman, p. 163; \* *Slater v. Slater*, *supra*). It has ceased to be law in New York (*Ametrano v. Downs*, 170 N. Y. 388). What courts look to now is the fact of change. That ascertained, they do not trouble themselves about the reason for the change. We cannot find substantial identity between this extraordinary dividend and the shares from which they came." (*Matter of Brann*, 219 N. Y. 263, at pp. 267, 268.)

The force of this opinion is sought to be avoided by counsel for the remaindermen by treating as *dictum* so much thereof as characterizes the distribution of 1911 as an extraordinary dividend. But not merely is the reasoning of the court persuasive but the reiteration of the description of the distribution as an "extraordinary dividend" and the cases cited to support that description (*Brundage v. Brundage*, 60 N. Y.

544, and *Equitable Life Assurance Society v. Union Pacific R. R. Co.*, 212 id. 360) together with the importance attached by the court to the determination of the nature of the distribution in question (because of its direct effect upon the nature of the stock whose ownership was before the court for adjudication), all demonstrate that the conclusion reached as to the character of this distribution was an essential part of its opinion and to be respected and followed as such. The case of *Equitable Life Assurance Society v. Union Pacific R. R. Co.* (212 N. Y. 360) is particularly illuminating as to the view which the court, in the *Brann* case, took of the distributed stocks as representing a distribution of surplus profits. In the *Equitable* case the facts are set forth in the opinion of Mr. Justice CLARKE in this court (162 App. Div. 81) as follows:

" In 1901 and 1902 the defendant purchased \$90,000,000 of common stock of the Southern Pacific Company and \$78,000,000 of stock of the Northern Pacific Railway Company and thereafter transferred said stock to the Oregon Short Line Railroad Company, a corporation subsidiary to and entirely controlled by defendant. Said stocks were paid for with the proceeds of the sale of the following bonds: \$100,000,000 face value first lien four per cent convertible gold bonds, which bonds were thereafter to the extent of \$99,450,000 converted by the holders into a like amount of the common stock of the defendant; \$31,000,000 face value four per cent participating twenty-five year gold bonds of said Oregon Short Line Railroad Company, which bonds were thereafter redeemed from proceeds of sale of about \$32,625,000 face value of four per cent twenty-five year refunding bonds of said Oregon Short Line Railroad Company.

" In 1902 the Northern Pacific Railway Company stock aforesaid was exchanged for upwards of \$82,000,000 par value of stock of the Northern Securities Company. In 1905, upon the dissolution of the Northern Securities Company, said Oregon Short Line Railroad Company sold a part of its holdings of stock of said Northern Securities Company and received in exchange for the balance of said holdings a large amount of the stocks of the Northern Pacific Railway Company and Great Northern Railway Company theretofore

held in the treasury of the said Northern Securities Company. Thereafter said Oregon Short Line Railroad Company sold the entire amount of stocks of the Northern Pacific Railway Company and the Great Northern Railway Company so acquired by it and reinvested the proceeds in stock of various other companies including \$32,334,200 par value of common and \$7,206,400 of preferred stock of the Baltimore and Ohio Railroad Company. In 1913, pursuant to a decree entered in a suit brought by the United States against the defendant and said Oregon Short Line Railroad Company requiring said companies to dispose of the Southern Pacific Company's stock then held by them, said Oregon Short Line Railroad Company exchanged with the Pennsylvania Railroad Company \$38,292,400 of the Southern Pacific Company stock held by it for \$21,273,600 of common, and \$21,273,600 of preferred stock of the Baltimore and Ohio Railroad Company. The capital stock of the Baltimore and Ohio Railroad Company acquired as aforesaid to the amount of \$28,480,000 of preferred and \$53,607,800 common stock was thereafter acquired by defendant from the Oregon Short Line Railroad Company.

"The proceeds of the sales, as alleged, of stocks of the Northern Securities Company, Northern Pacific Railway Company and Great Northern Railway Company exceeded by the amount of \$58,684,157 the cost of the stock of the Northern Pacific Railway Company from which said securities were derived, and after the sale this amount was credited by the Oregon Short Line Railroad Company to its profit and loss account and paid by it as a special dividend to the defendant as the holder of all its capital stock, and said amount was credited by defendant to its profit and loss account, and is included in its surplus as claimed. Various items of excess over cost realized by defendant on the sale of the other stocks and securities have likewise been credited to its profit and loss account and included in its claimed surplus.

"In July, 1907, defendant issued and sold bonds known as its twenty-year four per cent convertible gold bonds realizing upon said sale ninety per cent of the face value thereof in cash and charging to said profit and loss account the discount of ten per cent. Said bonds, by their terms, are convertible at the option of the holders into common capital

stock of the defendant at the rate of \$175 face value of such bonds for \$100 par value of such stock. Prior to January 8, 1914, of the bonds so issued there were surrendered for conversion \$37,025,800 face value, and in exchange therefor and upon the retirement of said bonds there was issued to the holders common capital stock of the defendant to the amount of \$21,157,600 par value. The net reduction of defendant's liabilities resulting from said bond conversion, to wit, the sum of \$15,868,200, has been credited by defendant to said profit and loss account and is included in the surplus claimed by it.

"The defendant by its charter and the laws of Utah is authorized to issue preferred and common stock, and now has outstanding 995,435 shares of the par value of \$99,543,500 of preferred and 2,166,624 shares of the par value of \$216,662,400 of common stock. The articles of association of said corporation provide as follows with regard to the respective priorities of said two classes of stock: 'Such preferred stock shall be entitled, in preference and priority over the common stock of said corporation, to dividends in each and every fiscal year, at such rate, not exceeding four per cent per annum, payable out of net profits, as shall be declared by the Board of Directors. Such dividends are to be non-cumulative, and the preferred stock is entitled to no other or further share of the profits.'

"And it is alleged that 'in all other respects said preferred and said common stock are entitled under said Articles of Association and the laws of Utah to equal rights in said corporation and its assets.'

"On January 8, 1914, the directors of defendant declared an extra dividend upon its common capital stock, payable April 1, 1914, consisting of the following amounts upon each share:

"*First.* Three dollars in cash.

"*Second.* Twelve dollars par value of preferred capital stock of the Baltimore and Ohio Railroad Company, and

"*Third.* Twenty-two dollars and fifty cents par value of common capital stock of the Baltimore and Ohio Railroad Company.

"The value of the stocks and cash proposed to be distributed by way of such extra dividend is approximately \$80,000,000.

"The dividend of four per cent per annum has been regularly declared and paid upon the preferred stock. Defendant's board of directors resolved that the extra dividend declared as aforesaid on January 8, 1914, was declared out of accumulated surplus of defendant, and that the capital stock of the Baltimore and Ohio Railroad Company which should be disposed of pursuant to said dividend declaration be charged to defendant's profit and loss account, and expressly found and declared that the accumulated unappropriated surplus profits of defendant exceeded the amount necessary to pay such dividend. While the complaint expressly alleges 'that the aggregate value of the assets of the defendant exceeds the aggregate amount of its outstanding capital stock and liabilities by the amount of the surplus or credit balance to its said profit and loss account,' it is claimed that the stock of the Baltimore and Ohio Railroad Company and the funds from which the proposed dividend is to be paid constitutes a capital asset of the defendant and forms a part of the *corpus* of its property, and that plaintiff and the other holders of preferred stock are entitled to share *pro rata* with the holders of common stock in any distribution of capital assets or accretions of capital."

The question before the court was whether the distribution of the Baltimore and Ohio stock was a distribution of profits or a distribution of capital, and it was held to be a distribution (even though unusual in amount) of accumulated gains or profits, which the directors of a going concern may at any time at their discretion divide among stockholders as income on their investment. The Court of Appeals said (p. 366): "When a corporation is organized it secures capital by the issue of shares of capital stock. The fund or property thus secured answers the twofold purpose of furnishing means for carrying on the operations of the corporation and also security for the payment of creditors. This capital stock is carried as a liability and universally, so far as I am aware, at its par amount. It is thus carried as a liability because this is the proper bookkeeping entry. But aside from this, such entry also serves to emphasize the duty of the corporation to keep its capital stock unimpaired for the protection of those dealing with it. If the operations of the corporation

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result in gains, such gains are carried to the credit, not of the capital stock account but of some other account as surplus or profit and loss. Of course they may be capitalized by the issue of stock against them and sometimes in the cases of certain corporations like banks or insurance corporations where a certain ratio between assets and liabilities other than to capital stock is required, such surplus or profits may be counted and maintained as capital although not formally capitalized.

“ In the absence of some such special consideration I think we may take notice that it is the ordinary rule of corporate management established by decisions, statutes and business usages that the surplus of these gains or profits beyond what may be necessary to keep good the liability to capital stock which has been issued, may, in the discretion of a board of directors, be distributed amongst its stockholders as dividends and returns on their investment.”

Judge Hiscock also quoted with approval (at p. 372) from the opinion in *Williams v. Western Union Telegraph Co.* (93 N. Y. 162) wherein it was said (at p. 191): “ But if it can be conceived that this was a dividend of property within the meaning of the section of the Revised Statutes above set out, then what property did it divide? Not any portion of the capital of the company; that remained intact. After subtracting the dividend there remained to the company the full amount of its prior capital stock, to wit: Property to the value of \$41,073,410. Such is the finding of the trial court, and that cannot here be disputed. The company had made surplus earnings which it could have divided, but instead of dividing them it had invested them in property to facilitate and enlarge its business; and such property was found to be worth \$15,526,590. That sum constituted its surplus. It was commingled with the other property of the company and used for corporate purposes. But it was not beyond the reach of the dividend-making power of the directors. They could reclaim it for division among the stockholders, and, if practicable, convert it into cash for that purpose. They could borrow money on the faith of it and divide that. They could issue to the stockholders certificates of indebtedness, redeemable in the future, representing their respective interests

in such surplus, thus, in effect, borrowing the same of the stockholders. Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus."

The referee's findings herein, supported by the proof, established that the cash undistributed earnings of the Standard Oil Company (New Jersey) from January 1, 1899 (little over a month before testator's death), to December 1, 1911, were \$328,691,788.13, which sum exceeds by over \$48,000,000 the value of the stocks distributed. The vouchers of the company and its books treat the distribution as one of "reserve profits" or "accumulated profits." The laws of the State of New Jersey prohibit the making of any dividends, except from surplus or from net profits arising from the business of the corporation unless its capital stock was reduced. ("An Act concerning corporations [Revision of 1896]," N. J. Laws of 1896, chap. 185, § 30, as amd. by N. J. Laws of 1904, chap. 143; 2 Comp. Stat. 1617, § 30.)

Treating the distribution of stocks as an extraordinary dividend, the rule applicable thereto is laid down in *Matter of Osborne* (209 N. Y. 450, 477): "2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

The action of the Standard Oil Company (New Jersey) was the setting apart for distribution among the stockholders by valid resolution of its directors of a portion of the corporate assets made available through accumulated earnings and without impairing the capital stock of the corporation. It makes no difference with the rule to be applied whether the distribution is practically enforced or voluntarily made. (*Hazzard v. Philips*, 173 App. Div. 431.) In the present case the particular course followed in the distribution can hardly be called compulsory, as other courses were left open

by the decision of the United States Supreme Court, even if they were less practicable. Nor was it necessary that the resolution of distribution should be called in terms a dividend. "A division of profits without the formality of declaring a dividend is the equivalent of declaring a dividend." (*Hartley v. Pioneer Iron Works*, 181 N. Y. 73.)

In the case at bar the original shares of the Standard Oil Company (New Jersey) stock owned by the testator and passing to his trustees were not reduced either in number or value by the distribution, nor was the capital of the trust fund as received from the testator entrenched upon, either in whole or in part. On the contrary, after this distribution of stocks the book value of the shares in the Standard Oil Company (New Jersey) was \$281.72 per share, while on December 31, 1899, the book value of each share was only \$202.32. I am, therefore, of opinion that the integrity of the trust fund having been in no way impaired by the distribution in question, the shares of stock so distributed by way of extraordinary dividend must be awarded to the life beneficiaries.

As the stocks distributed were the property of the life beneficiaries from the date of their receipt by the trustee, the life beneficiaries are, of course, also entitled to all subsequent dividends, distributions and subscription rights accruing upon shares, and no questions of apportionment arise in reference thereto.

I believe that the judgment appealed from should be modified so as to award to the life beneficiaries all shares received by the trustee upon the distribution by the Standard Oil Company (New Jersey) in December, 1911, and January, 1912, as well as all extraordinary dividends and subscription rights made or offered thereafter by any of the companies whose stocks were so distributed; and as so modified, the judgment should be affirmed, with costs to all parties who have appeared on this appeal, payable out of the trust fund.

Judgment modified as stated in opinion, and as modified affirmed, with costs to all parties appearing, payable out of the trust fund.



## FLINN REALTY CORPORATION, Appellant, v. CHARTER CONSTRUCTION COMPANY, Respondent.

First Department, February 15, 1918.

**Vendor and purchaser — suit for reformation of contract to exchange properties and for specific performance — evidence — notice of restrictions upon property — principal and agent — when knowledge of agent not imputable to principal.**

In a suit to reform a contract for the exchange of properties made between the plaintiff and the defendant, and for the specific performance of the contract as reformed, it appeared that the parties were to give full covenant deeds. It was claimed by the defendant that there were restrictions upon the plaintiff's property so that it could not give a full covenant deed, but the plaintiff claimed that the parties had knowledge of these restrictions at the time the contract was made, and by inadvertence they were not included therein. The alleged restrictions consisted of a covenant that all the buildings on plaintiff's lots should set back twenty-five feet, and that no building should be erected to cost less than a certain amount.

*Held*, on all the evidence, that it is inconceivable that if said restrictions existed and the facts were known to the plaintiff and its attorneys, the contract could have been drawn by counsel providing for a full covenant deed without excepting said restrictions; that, therefore, a judgment dismissing the complaint upon the merits should be affirmed.

The fact that defendant's agent saw plaintiff's property before the contract was made, and that the lots were uniform in size and the buildings thereon a uniform distance from the road was not notice to the defendant of the restrictions upon the lots, neither was the knowledge of the broker, who represented both parties, imputable to the defendant.

Actual intention can only be judged by actual knowledge, not by constructive knowledge.

Where notice is a relevant fact, it cannot be imputed to the defendant for the purpose of ascertaining what in fact was the intention of the defendant at the time the contract was made.

As the complaint charges knowledge of the restrictions, and an intent to provide for them in the contract, and asks for a reformation to that extent, and includes no offer to make compensation for the defects, the judgment cannot be reversed on the ground that the defects have been waived and specific performance can be decreed with compensation.

APPEAL by the plaintiff, Flinn Realty Corporation, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 2d day of August, 1917, dismissing the complaint on

the merits upon the decision of the court after a trial at the New York Special Term.

*Edward M. Grout* of counsel [*Grout & McKinney*, attorneys], for the appellant.

*Frederick E. Anderson* of counsel [*Norman Wilmer Chandler* with him on the brief; *Stoddard & Mark*, attorneys], for the respondent.

SMITH, J.:

The action is brought to reform a contract made between plaintiff and defendant and for a specific performance of the contract as reformed.

The defendant owns some property on Park avenue. The plaintiff owns property on Fifth avenue and also at Cape May, N. J. The contract called for the transference of these properties by one to the other, subject to certain incumbrances, named in the contract. It then provided that the parties were to give full covenant deeds of the property. It is claimed that there were restrictions upon the Fifth avenue property and also upon the Cape May property, so that the plaintiff could not give a full covenant deed and for that reason the contract was rescinded by the defendant and it has been so found by the trial court. The plaintiff challenges this finding upon the ground that the parties had other knowledge of these restrictions at the time that the contract was entered into and by inadvertence they were not mentioned in the contract, and that the contract should be reformed so as to require from the plaintiff the full covenant deed, subject, however, to these restrictions existing thereupon.

Upon the oral testimony the conflict is clear. The defendant denies absolutely that it had any knowledge of these restrictions until long after the signing of the contract. The evidence of the plaintiff is very uncertain and unsatisfactory as to any information imparted to the defendant at that time. The parties were represented by able counsel when the contract was drawn and to my mind it is inconceivable if these restrictions existed upon the Cape May property, and these facts were known to the plaintiff and its attorneys,

that this contract should have been drawn providing for a full covenant deed without excepting these restrictions. Here were a large number of lots in Cape May. There were about twenty or twenty-one houses upon these lots. They all set back from the street about twenty or twenty-five feet and the grant contained a covenant that they should set back twenty-five feet and also that no building should be erected on those lots to cost less than \$2,500, so that the owners of the lots, if the lots should be sold, were precluded from building garages upon them that would cost less than \$2,500 and the restrictions were material restrictions and materially affected the value of the property. Notwithstanding the conflict in the evidence as to the notice of the restrictions upon this Cape May property, the plaintiff claims that there are two facts which prove beyond fair question that the defendant had knowledge.

*First.* The defendant's agent, Guthman, went down to Cape May and saw the lots before the contract was made and he saw that they were uniform in size and the buildings at a uniform distance from the road, and plaintiff insists that was notice to defendant that there were restrictions upon the lots. I do not see the force of this claim. It was notice that there was a uniform plan upon which the houses were built. The houses were all exactly the same, and, therefore, undoubtedly built by the same party. This was not notice that they were required to be built that way, and at least it was not notice to him that there was any prohibition against putting any building upon any of these lots which would cost less than \$2,500.

Again, it is claimed that Tucker, who was in fact the broker for both parties, the broker for the plaintiff to sell his property and the broker for the defendant to sell his property, had knowledge of these restrictions, and that his knowledge was imputable to the defendant as his principal. But Tucker had a \$10,000 interest in the result of this case. I do not give much force to his claim that he had knowledge of these restrictions and notified the defendant. As to the fact of constructive notice by reason of his agency, this fact is without significance because here is a question of actual intention and actual intention can only be judged by actual knowledge and

not by constructive knowledge. This contract cannot be reformed by whatever knowledge Tucker may have had and to whatever extent that knowledge may be imputed to the defendant. Where notice is a relevant fact, it cannot be imputed to the defendant for the purpose of ascertaining what in fact was the intention of the defendant at the time the contract was made.

The plaintiff perhaps, as its strongest claim, insists that upon October twenty-first, at least, the defendant and Guthman had full knowledge of these restrictions and upon October twenty-third wrote to a title insurance company to insure the title of the property. This is claimed to be an admission upon the part of the defendant that it at all times had knowledge of these restrictions and intended to take the property subject thereto. But there is just as strong an inference that defendant found this fact out in time and was willing to proceed with the contract and waive these restrictions. It has been held under some circumstances that proceeding with negotiations after knowledge of defects is a waiver of those defects, and that the plaintiff can have specific performance upon paying compensation therefor. But the difficulty in reversing this judgment upon claim of waiver is that that is not the theory of the complaint. The complaint charges knowledge of these restrictions and an intent to provide for them in the contract and asks for a reformation of the contract to that extent. No offer to make compensation for the defects is included in the complaint and the case was not tried upon the theory of waiver, nor was it argued in this court upon that theory and no authorities are cited to sustain such a claim. We cannot now reverse the judgment on the ground that the defects have been waived and specific performance can be decreed with compensation.

I am unable to see how these extraneous facts strengthen the plaintiff's testimony sufficiently to come within the rule to authorize the reformation of the contract. As I have said, I do not believe it was known to these parties at the time or it certainly would have been included in the contract. Whether a cause of action must be proven beyond a reasonable doubt or whether it must be proven by evidence that is clear and convincing, in either case the proof does not measure up to the

requirements of the law and the judgment must be affirmed. It becomes unnecessary to consider the objections to the title of the Fifth avenue property.

The judgment should be affirmed, with costs.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Judgment affirmed, with costs.

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JACOB A. KIRSCH, Appellant, v. PACIFIC COMMERCIAL COMPANY, INC., Respondent.

First Department, February 15, 1918.

**Sale — action by purchaser for failure of defendant to deliver merchandise — defense — inability to make shipment because of war conditions — erroneous charge as to duty of purchaser to go into open market and actually purchase the merchandise.**

Where in an action by a purchaser of Manchurian garlic, for the failure of the defendant to deliver the same, the defendant claimed that it was unable by reason of war conditions to have the goods shipped, and that it is relieved from liability under the provision of the contract that if the seller is unable to make shipment on account of the embargo against the exportation of food products or other unavoidable delays beyond control, the contract is void, and the court charged that it was the duty of a party under similar circumstances to go into the open market and buy and charge the defendant simply for the balance, it was reversible error to refuse a request to charge further that the law does not require the purchaser to go into the open market and actually purchase the merchandise, as the jury might have understood from a refusal to so charge that the court had intended that the plaintiff could not have any recovery if he did not go into the open market and buy.

APPEAL by the plaintiff, Jacob A. Kirsch, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 7th day of March, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of February, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*Henry L. Franklin*, for the appellant.

*Clarke M. Rosecrantz* of counsel [*Sullivan & Cromwell*, attorneys], for the respondent.

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SMITH, J.:

The defendant's agent offered to sell to the plaintiff 1,000 cases of Manchurian garlic, each case to contain 100 pounds. The deliveries were to be made in three equal installments in November and December of 1915, and January of 1916. There was a provision in the contract that if the seller is unable to make shipment on account of embargo against the exportation of food products or other unavoidable delays beyond control, the contract is void. No shipments were made in November, December or January as specified in the contract. Upon February twenty-fifth a shipment of garlic was sent to San Francisco, which was offered to the plaintiff, but the plaintiff had already commenced his action and refused to accept the same. The defendant's answer to the plaintiff's claim is that it was unable by reason of war conditions to get its goods shipped until February 25, 1916; that it made inquiry of the four principal transport lines and also that it sought through a broker to find any other means to obtain transportation, and it claims to be relieved under the provisions of the contract that the contract was to become void through any unavoidable delay. This question was properly submitted to the jury because the evidence was the evidence of the principal of the defendant, who was interested in the event of the action, and also because there was evidence of a shipment of a small quantity of bristles during the period in which the defendant claims to have been unable to have shipped this garlic. It is sworn that the garlic was purchased and ready for shipment but that it was not shipped simply because of inability to get transportation. There was evidence that garlic could be bought in the market which was substantially as good garlic as this Manchurian garlic for about eleven cents.

In the court's charge to the jury upon the question of damages the court said: "If you know that I am going to break my contract in failing to deliver to you a certain commodity, and that commodity is right here in the open market, or something equally as good, it is your duty to go out and buy it and hold me for the balance, but you cannot sit down idly, you cannot refuse to move your hand, and then come in and claim the whole amount, and the contention upon the

part of the defendant in this case is that this proof shows that there was a great similarity in the various grades of this garlic material, and that the plaintiff, if he had suffered any loss as claimed by him, could have gone out into the open market and bought the Italian, the Spanish or something equally as good, and tendered that, or at least made an attempt to tender that to his so-called customer."

After this charge the attorney for the plaintiff requested the court to charge: "I ask your Honor to charge the jury that the law does not require the purchaser to go into the open market and actually purchase the merchandise."

The court refused to charge any further than it already had charged upon that subject and to this an exception was taken.

It seems to me clear that the plaintiff was entitled to have this request charged. The court had theretofore charged that it was the duty of a party under similar circumstances to go into the open market and buy and charge the defendant simply for the balance. The jury might well have understood from his refusal to charge this request that it had intended to put that obligation upon the plaintiff, and that he could not have any recovery if he did not go into the market and buy. The jury rendered a verdict of no cause of action and it cannot be said that they were not misled by this erroneous refusal to charge as requested.

The judgment and order must be reversed and a new trial granted, with costs to appellant to abide the event of the action.

SCOTT, LAUGHLIN, DOWLING and DAVIS, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

SAMUEL ROSEFF, Appellant, v. HELEN A. BEALS, Respondent.

Second Department, February 1, 1918.

**Landlord and tenant — action for rent — oral agreement of landlord to make improvements — erroneous charge.**

Where a landlord sues to recover rent and the tenant defends on the ground that there was an oral agreement contemporaneous with the lease that it was not to take effect until the landlord had made certain improvements, it was error for the court to refuse to charge that if the repairs were to be made during the term of the lease the jury must not consider the evidence as to the oral agreement, there being proof which made the request to charge germane.

APPEAL by the plaintiff, Samuel Roseff, from a judgment of the City Court of Mount Vernon in favor of the defendant, entered in the office of the clerk of the City Court of Mount Vernon on the 23d day of February, 1917, dismissing the complaint on the merits upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying plaintiff's motion for a new trial made upon the minutes.

*Stephen Holden* [*James H. Cavanaugh* with him on the brief], for the appellant.

*J. E. Quinn*, for the respondent.

JENKS, P. J.:

In this action by a landlord to recover rent under a written lease, the defendant pleaded *inter alia* that prior to and at the time of the making of the written agreement of lease the parties further covenanted and agreed that said lease should not take effect or be in force until the plaintiff should install an adequate heating apparatus in the dwelling house on said premises and make other repairs to the premises, particularly to the roof and to the plumbing system. The lease was silent on this matter. The jury returned a general verdict for the defendant.

The learned court refused under exception to charge the jury that if the repairs alleged to be made to the plumbing, to the roof, and installation of the new heating system, were to be made during the term of the lease, they must not consider the evidence as to the oral agreement. There was



proof that made the request germane. I think that the exception was well taken. (*Greene v. Ker*, 48 Misc. Rep. 609, citing *Hall v. Beston*, 16 id. 528; 26 App. Div. 105; *affd.*, 165 N. Y. 632, on opinions below.)

The judgment and order of the City Court of Mount Vernon should be reversed and a new trial ordered, costs to abide the event.

THOMAS, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Judgment and order of the City Court of Mount Vernon reversed and new trial ordered, costs to abide the event.

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In the Matter of HERMAN L. ROTH, an Attorney, Respondent.

First Department, February 15, 1918.

**Attorney and client — charges of professional misconduct in inducing client to sign deed of trust and execute contingent fee agreement not sustained — attorney severely censured for commingling trust fund with his own and using same and for making certain investments — effect of prior good reputation in community and lack of willful dishonesty.**

Charges against an attorney at law of professional misconduct in inducing his client to sign a deed of trust and an agreement for a contingent fee of twenty-five per cent of whatever he might be able to secure for her in the settlement of her husband's estate, *held*, not to have been sustained by the evidence.

Said attorney should be severely censured, however, for commingling the trust fund with his own, and at times using it as his own, and also for investing the funds in second mortgages and in corporate stock.

The fact that said attorney appears to have maintained a good reputation in the community and does not appear to have been guilty of willful dishonesty has protected him from more severe disciplinary measures.

DISCIPLINARY proceedings instituted by the Association of the Bar of the City of New York.

*John G. Jackson* of counsel [*Einar Chrystie*, attorney], for the petitioner.

*Frederic Cyrus Leubuscher*, for the respondent.

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## PER CURIAM:

This is a disciplinary proceeding instituted by the Association of the Bar of the City of New York. The respondent is a man of mature age who has been a member of the bar for over twenty years. He is charged with misconduct in his professional relations with one Grace V. Grosz, now deceased. Mrs. Grosz' husband died suddenly on December 19, 1911, and in a few days afterwards she consulted the respondent as to her affairs which she desired him to take in charge. There seems to have been some doubt at that time as to how much the husband's estate would amount to, and Mrs. Grosz also apprehended that her deceased husband's relatives might contest her right to administer the estate and to enjoy it. She had no money with which to pay a retainer and it was ultimately agreed, in writing, that respondent should retain twenty-five per cent of whatever he might be able to secure for her. There was some contest before the surrogate as to who should be appointed administrator and it was finally agreed that one Edward Schwartz, an office associate of the respondent, and one Arthur J. Grosz, a brother of the deceased husband should be appointed administrators. Mrs. Grosz had contracted such habits that it was deemed inadvisable by all concerned in her welfare that she should have control of whatever might come to her from her late husband's estate, and with the full concurrence and approval of her father, and her other nearest relative, it was arranged that she should execute, as she did, a trust agreement to respondent whereunder she should receive the income during her life, and at her death the principal should be divided between certain nephews and nieces. At the same time that Mrs. Grosz executed this trust deed, she also executed the agreement that respondent should retain the contingent fee above referred to for his services. Thus respondent assumed towards Mrs. Grosz the dual relationship of attorney and trustee.

The charges against the respondent are that he was guilty of misconduct in obtaining from Mrs. Grosz the execution of the trust agreement and retainer, in having converted to his own use some of the money received by him pursuant to the terms of the trust agreement, and in having improperly managed and invested the trust estate. With reference to

the execution of the trust deed the gravamen of the charge is that Mrs. Grosz was not in a mental condition when she executed it to know what she was doing. The referee finds this charge unsustained, and the same conclusion was arrived at by a referee appointed by the Supreme Court in a proceeding wherein the respondent was called upon to account. The evidence seems to justify these conclusions, especially since the execution of the trust deed was known to and approved of by Mrs. Grosz' relatives who were interested in the protection of the estate. The exaction of a contingent fee of twenty-five per cent appears in the light of the subsequent history of the case to have been unreasonable. But it could not be known when the agreement was made just what difficulties might be in the way of collecting the estate, and, as the official referee justly observes in the circumstances as they existed at the time, the opinion of fair-minded men, well qualified to judge, might well have differed as to the reasonableness of the fee agreed upon. In the accounting proceeding already referred to the amount which would have been received by respondent under this agreement has been reduced by one-half, and he has made a settlement on this basis. We think he should be acquitted of intentional misconduct in inducing his client to sign the agreement for the contingent fee.

The charge of conversion of the funds is based upon a practice by the respondent which we have often had occasion to condemn under like circumstances. That is that he commingled these funds with his own by depositing them in his personal bank account upon which he drew from time to time for his own purposes without taking care to see that there always remained in the account a sufficient sum to cover the amount of the trust fund for which he was then responsible. It appears that on several occasions, at least, his bank account did not represent sufficient funds to make good the trust estate for which he was at the time chargeable. This practice resulted in, at least, a technical conversion of the fund to his own uses, and is deserving of severe censure. Fortunately it does not appear to have resulted in any loss to the estate. The official referee also finds that the respondent was censurable for having invested part of the funds in second mortgages and in stock of a certain corporation. In this view we entirely

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concur, notwithstanding the deed of trust was so drawn as to vest a wide discretion in the trustee in regard to investments. The respondent does not appear to have been actuated by any desire to make a personal profit by these investments, but to have been influenced by a desire to gain a larger income from the fund than could have been obtained from more conservative investments. Here again the estate fortunately has not suffered any ultimate loss. In conclusion we are of opinion that in so far as the respondent has been charged with professional misconduct in inducing his client to sign the deed of trust and the contingent fee agreement the charges are not sustained. But in so far as he commingled the trust fund with his own, and at times used them as if they were his own, and in so far as he made the investments referred to he is entitled to the severe censure of the court which is hereby passed upon him.

That no more severe disciplinary measure is taken is due to the fact that respondent appears to have maintained a good reputation in the community, and does not appear to have been guilty of willful dishonesty.

Present — CLARKE, P. J., LAUGHLIN, DOWLING, SMITH and PAGE, JJ.

Respondent censured. Order to be settled on notice.

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JOSEPH SCHENKER, Respondent, v. RITA PEARL SCHENKER,  
Appellant.

First Department, February 15, 1918.

**Husband and wife — action to annul marriage upon ground that wife had husband living — defense — validity of divorce procured in another State without personal service of process upon or appearance of defendant.**

The courts of the State of the last matrimonial domicile can grant a decree of divorce without personal service of process upon or the appearance of the defendant therein, where the constructive service of process is made in accordance with the laws of that State, and such a decree is entitled to full faith and credit in the courts of all the States of the Union.

Hence, where in an action to annul a marriage between the plaintiff and defendant, on the ground that the defendant at the time the marriage was solemnized had a husband living, it appears that the plaintiff and defendant were married in South Carolina; that prior thereto the defendant had procured a divorce from her former husband in the State of Alabama, their last matrimonial domicile; that the defendant, who was then a resident of the State of Mississippi, was not personally served and did not appear, but was served by publication and by mail, a judgment in favor of the plaintiff should be reversed.

APPEAL by the defendant, Rita Pearl Schenker, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of July, 1917, upon the decision of the court after a trial at the New York Special Term.

The judgment annulled the marriage between the parties.

*Abraham M. Davis* of counsel [*Harry Bloom*, attorney], for the appellant.

*J. William Hill*, for the respondent.

PAGE, J.:

This action was to annul a marriage between the plaintiff and defendant, on the ground that the defendant, at the time the marriage was solemnized, was the wife of Nathan Beiman, who was then living. The facts in this case are stipulated and, briefly stated, are as follows: The plaintiff and defendant were married in South Carolina in August, 1904, and lived and cohabited together as husband and wife. On the 25th day of June, 1916, the plaintiff voluntarily abandoned the defendant and has since failed and refused to live and cohabit with her. There is no issue of the marriage. The defendant, on the 25th day of August, 1889, was married to one Nathan Beiman in the city of Chicago, Ill., and lived and cohabited with him a number of years after said marriage. The place of their last matrimonial domicile was in the State of Alabama. The said Beiman removed from the State of Alabama to the State of Mississippi, and the defendant lived separate and apart from her said husband and subsequently commenced an action for divorce against him in the City Court of Birmingham, Ala., which resulted in a decree of divorce. Personal service of process was not made on said

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Beiman, nor did he appear in the said action. Service was, however, made by publication and by mail. At the time the action was commenced and when the decree was granted Beiman was not a resident of Alabama, but was a resident of the State of Mississippi; but the defendant was a resident of the State of Alabama, which was the State of the last matrimonial domicile. At the time of the marriage of the plaintiff and defendant, Beiman was alive, and no other decree of divorce of any court than that of the City Court of Birmingham was ever granted. The marriage has been annulled upon the ground that the decree of divorce granted by the City Court of Birmingham was null and void and of no effect.

The courts of this State have been reluctant to give full faith and credit to the decrees of divorce granted by the courts of other States where it appeared that process was not personally served on the defendant, or that the defendant did not appear in the action, upon the ground of public policy; but it has been recognized that "this rule of public policy is enforceable only for the protection of the citizens of this State." (*Kaufman v. Kaufman*, 177 App. Div. 162, 164.) It, therefore, might be sufficient in this case to hold that as, at the time the action for divorce was pending in the Alabama court, neither of the parties thereto was a citizen of this State, and neither the plaintiff nor defendant herein was a citizen of this State when the marriage was solemnized in South Carolina, this rule of public policy did not apply and that the marriage, being lawful in South Carolina, was valid and could not be questioned in this State. But the Supreme Court of the United States, which is the ultimate authority, has definitely decided that the courts of the State of the last matrimonial domicile can grant a decree of divorce without personal service of process upon, or the appearance of, the defendant therein, where the constructive service of process was made in accordance with the laws of that State, and that such a decree is entitled to full faith and credit in the courts of all the States of the Union. (*Atherton v. Atherton*, 181 U. S. 155; *Haddock v. Haddock*, 201 id. 562; *Thompson v. Thompson*, 226 id. 551, 561.) The judgment in this case contravenes this rule as laid down in these cases and must be reversed.

The defendant counterclaimed for a decree of separation with maintenance. As the amount to be awarded for maintenance is not stipulated, nor any facts upon which an award thereof could be predicated stated in the record, although the fact of the abandonment is, we cannot award the judgment. There will, therefore, have to be a new trial. The interlocutory judgment is reversed, with costs to the appellant, and a new trial ordered.

CLARKE, P. J., LAUGHLIN, SCOTT and SHEARN, JJ., concurred.

Judgment reversed, with costs to appellant, and new trial ordered. Order to be settled on notice.

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WILLIAM J. LOGAN, Respondent, v. FIDELITY-PHENIX FIRE INSURANCE COMPANY, Appellant.

First Department, February 1, 1918.

**Pleading — complaint alleging loan of stock returnable on demand pursuant to valid express contract and praying equitable relief — demurrer — failure to state cause of action at law — effect of prior judgment holding contract invalid.**

A complaint which shows that the plaintiff pursuant to the terms of a valid express contract executed by the defendant's president, loaned stocks to it returnable on demand, and alleges that plaintiff was induced to enter into said contract by reliance upon certain false statements by defendant's president, and that the defendant instead of using the stock to borrow money for a certain specified purpose, pledged it and used the money obtained for other purposes, and that the pledgee thereafter sold the stock, does not state a cause of action for an accounting, and since there was no allegation that any demand had ever been made for the return of the stock, it does not even state a cause of action at law and is, therefore, demurrable.

The court was not bound, under the circumstances, to hold the contract invalid on its face, because it was so held in another action between the same parties.

APPEAL by the defendant, Fidelity-Phenix Fire Insurance Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of October, 1917,

overruling a demurrer to the complaint and granting plaintiff judgment on the pleadings.

*Elihu Root* of counsel [*David Rumsey* with him on the brief], for the appellant.

*Anson Beard* of counsel [*Gifford, Hobbs & Beard*, attorneys], for the respondent.

SHEARN, J.:

The defendant has appealed from an order granting plaintiff's motion to overrule a demurrer to the complaint, interposed on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint, after alleging the broad and entirely sufficient power of Sheldon, as president of the Phenix Insurance Company, derived both by the terms of its charter and by the custom of the business, to warrant him in making the contract of borrowing which is set forth in the complaint, alleges the making of a contract between the plaintiff and the Phenix Insurance Company, acting through Sheldon, its president, by which the stock, which is the subject of this action, was borrowed by the Phenix Insurance Company under an agreement to return the stock on demand. It is alleged that the plaintiff was induced to enter into the contract by reliance upon certain statements made by Sheldon concerning the business of the company, the occasion for the loan and the use which the defendant intended to make of the loan, which statements were untrue. Further, that plaintiff delivered the stock "to the said Sheldon as president, and for the account, of said Phenix Insurance Company," and that "the said Sheldon, as president of said Phenix Insurance Company, at the same time delivered to plaintiff a receipt for the said shares of stock, of which the following is a copy:

"NEW YORK, October 27, 1909.

"Received of Mr. Wm. J. Logan, fourteen hundred (1400) shares of Am. Sugar Refining Co. com. stock, for acct. of Phenix Insurance Co., to be returned on demand.

"GEORGE P. SHELDON, *President.*"



The complaint further alleges that plaintiff subsequently ascertained the falsity of Sheldon's statements and that, instead of the company having used the stock to borrow \$145,000 for the purpose of transferring certain reinsurance, Sheldon borrowed that sum on the loaned stock and by "the use of practically all of the aforesaid sum of one hundred and forty-five thousand dollars (\$145,000)" paid a \$10,000 indebtedness of the Phenix Insurance Company and completed the performance of a contract under which that company was obligated to purchase \$200,000 face value of New York city bonds, which were thereby actually purchased by the company and were delivered into its treasury. The complaint further alleges that the pledgee from whom Sheldon borrowed the \$145,000 thereafter sold plaintiff's pledged stock and paid the \$145,000 loan from the proceeds of the sale. The complaint demands judgment that it be ascertained through an accounting what part of the \$145,000 borrowed by Sheldon on plaintiff's stock was used for the benefit of defendant and found its way into defendant's treasury through the aforesaid transactions and that plaintiff have judgment for the amount so ascertained.

It is insisted on behalf of the plaintiff that this is an equitable action to trace the assets or money by which the defendant was unjustly enriched and to compel defendant to account for that part of plaintiff's money which was used for the company's benefit. On the other hand, the defendant maintains that on the face of the complaint a valid express contract appears under which the Phenix Insurance Company is obligated to return plaintiff's stock on demand, and that the existence of such a valid express contract precludes any recovery of benefits derived from the stock. In determining which contention is correct, we are confined to the allegations in the complaint. Conceding, as the demurrer does, the broad power of Sheldon to borrow stock for the use of the company, it cannot be seriously denied that the complaint sets forth a complete, express and, on its face, a perfectly valid contract obligating the defendant to return the borrowed stock on demand. It is not alleged that any demand was ever made for the return of the stock, but it does clearly appear that unless the defendant returns the stock

on demand it will be liable to respond in damages as for a conversion. Under such circumstances, of course it is of no concern to the plaintiff what use the defendant has made of the borrowed stock or what benefit it has received therefrom. Where plaintiff shows that pursuant to the terms of a valid express contract he has loaned stocks returnable on demand, no basis is laid for any accounting. Before answer, a complaint praying equitable relief for which no basis is laid and showing a cause of action at law is demurrable. (*Low v. Swartwout*, 171 App. Div. 725.) But this complaint does not even state a cause of action at law because of the failure to allege a demand for the return of the borrowed stock. Neither are we concerned with any implied contract, for the express contract precludes the existence of an implied contract. (*Gauld v. Lipman*, 4 Misc. Rep. 78; *Work v. Beach*, 53 Hun, 7.)

But, it is said, the court should, in spite of the broad allegations of Sheldon's power and authority, hold the contract to be invalid on its face, because it was decided in another action between the same parties (161 App. Div. 404) that the contract was invalid. It is further said that the position of the defendant is illogical and untenable, if not unconscionable, in that having succeeded in another action in having the contract declared to be invalid it is now seeking to defeat the plaintiff by asserting that the contract is valid. In making this argument plaintiff's counsel either fails or refuses to appreciate that in the other case the defendant, on a trial of the merits, established as a fact that Sheldon did not have the power to make the contract sued on, whereas here the defendant is merely dealing with a question of law on demurrer, where it is compelled to admit the allegations of authority. Notwithstanding the adjudication upon the trial of the other case, the plaintiff has again alleged that the contract was authorized and has set forth facts which, when uncontroverted, show on their face that he did have authority. There is no allegation in the complaint showing what were the pleadings in the other case, what the facts were that were litigated, the scope of the issues, or what was decided. If the plaintiff is really proceeding upon the theory of unjust enrichment, growing out of the use by the defendant for its benefit of

money obtained from the plaintiff pursuant to a contract negotiated by Sheldon, as president, in excess of or without authority, the facts should be so alleged, instead of setting out what appears on its face to be a perfectly valid express contract negotiated under broad and sufficient powers.

Other interesting questions are raised by the learned counsel for the defendant, but it is unnecessary to pass upon them in the present state of the complaint.

The order should be reversed, with ten dollars costs and disbursements, and the motion to overrule the defendant's demurrer to the complaint denied, with ten dollars costs, with leave to plaintiff to amend the complaint within twenty days after notice of entry of the order of reversal.

CLARKE, P. J., LAUGHLIN, SCOTT and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to plaintiff to amend on payment of costs.

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JOHN A. WOLFF, Respondent, v. UNITED DRUG COMPANY,  
INC., Appellant.

First Department, February 1, 1918.

**Malicious prosecution — reversible error — suggestions to jury and admission of evidence as to arrest of plaintiff on another charge for which defendant was not responsible — right of counsel to draw inferences from evidence.**

Where, in an action for malicious prosecution based upon an arrest of the plaintiff for larceny, it appeared that at the time of the arrest he was already in custody upon a charge of having cocaine in his possession, upon which he was convicted, the larceny charge having been dropped, and there was no evidence that the defendant had anything to do with the investigation of the narcotic charge or with the arrest of the plaintiff thereon, it was reversible error for the plaintiff's counsel from the beginning of the case to the end to suggest to the jury that the defendant was responsible for the narcotic charge and to introduce evidence over objection of the circumstances attending the search of plaintiff's residence in aid of the narcotic charge, which evidence preceded the arrest of the plaintiff on the charge of larceny.

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While counsel has a right to draw his own inferences from the evidence, a verdict cannot stand based even in part upon utterly improper and unwarranted inferences from irrelevant and improper evidence.

PAGE, J., and CLARKE, P. J., dissented, with opinion.

APPEAL by the defendant, United Drug Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of July, 1917, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 20th day of July, 1917, denying a similar motion.

*James A. O'Gorman* of counsel [*Cornelius J. Smyth* with him on the brief; *O'Gorman, Battle & Vandiver*, attorneys], for the appellant.

*Lowen E. Ginn* of counsel [*Joseph O. Skinner*, attorney], for the respondent.

SHEARN, J.:

When the arrest for larceny was made, upon which is based this action for malicious prosecution, the plaintiff was already in custody in the police station, having been arrested earlier in the same evening by officers of the police drug squad upon the charge of having cocaine in his possession without a pharmacist's record. The larceny charge was dropped without a hearing and the detention of the plaintiff pending bail was directly due to the narcotic charge, which proceeded to a judgment of conviction and suspended sentence. There is not a particle of evidence that the defendant had anything whatsoever to do with the investigation of the narcotic charge, or with the arrest of the plaintiff upon that charge. It clearly appeared that the narcotic charge first came to the attention of the defendant when the officers visited defendant's general offices, inquiring for the plaintiff as a result of the receipt by the police authorities of an anonymous letter signed "A heart-broken wife" complaining of the plaintiff, and charging him with supplying her husband with cocaine. Nevertheless, the plaintiff's counsel, from the beginning of the case to the

end, without any evidence to warrant him in so doing, persisted in suggesting to the jury that the defendant was back of and responsible for the narcotic charge and, over the repeated objection of the defendant, introduced in evidence all of the circumstances attending the search of plaintiff's residence on a search warrant in aid of the narcotic charge, and all of the distressing and humiliating circumstances attending the search and the arrest of the plaintiff on that charge. In his opening narrative, referring to the search on the narcotic charge, plaintiff's counsel stated that plaintiff asked the officers, "Who was back of this," and started to say, "They told him —" when defendant's counsel interposed an objection, which was overruled and exception taken. Thereupon plaintiff's counsel promised to connect the statement with the defendant (which he never did) and proceeded: "They suggested to him 'You know who you are working for.'" Proceeding with the examination of the plaintiff and referring to the visit of the officers making a search for the narcotics, plaintiff's counsel asked: "State now briefly, if you will, as slowly and in such a tone of voice so that the jury will hear you, what took place." This was objected to but the objection was overruled and exception taken. Plaintiff proceeded to describe the search and relate all that the officers said. Defendant's counsel again objected but was overruled. Plaintiff then, referring to a paper exhibited to him by one of the officers, said, "I had a chance to see this letter and I read it, in heavier type; it was a typewritten letter, the letter, 'Riker-Hegeman'— Q. One of the officers had handed you a paper to read; is that what you mean? A. Yes, sir." Objection was again made and overruled. Plaintiff then proceeded to describe the search as continued in the presence of his mother and daughter and related a conversation between himself and his daughter. Defendant's counsel continued to object but was overruled. Plaintiff's counsel proceeded: "Go right along and speak loud so that these men can hear it, what was said to you, after you asked 'Who is behind it?' A. They said, 'Well, you know who you are working for?' I said, 'Yes.' They said, 'For who?' I said 'Riker-Hegeman Company.'" Objection was again taken and overruled with exception to the defendant. Plaintiff's counsel proceeded:

" Q. Go on from the time that you say these men were in the hall talking to themselves and they asked you if you had any friends, go right on from that, what took place? A. Finally they says, ' You will have to come along, where is your coat; put on your coat, we will have to take you along.' Then my little girl started to cry and said, ' Don't take my daddy away.' " On defendant's objection and motion the court first struck this out, but upon the claim of plaintiff's counsel that he was entitled to show " the entire atmosphere of that search," the court reversed its ruling and allowed this evidence of " atmosphere " to remain in the record " on the subject of damages." All of this evidence, it will be noted, had to do with the search and arrest on the narcotic charge, with which the defendant was unconnected, and it all preceded the arrest of the plaintiff on the charge of larceny, which was the subject of this action. In summing the case up, plaintiff's counsel persisted in his attempt to inject " atmosphere " into the case and inflame the jury against the defendant, which he characterized as a " damnable corporation " by arguing that, although " it is not proven in this case," the inference was that the defendant had written the anonymous letter to the police signed " A heartbroken wife " in order to obtain a search of the plaintiff's premises and discover whether he had been stealing its property. This was further calculated to saddle upon the defendant responsibility for the humiliation and mental anguish of the plaintiff, occasioned by the search of his premises and his arrest in the presence of his mother and daughter upon the narcotic charge. Although plaintiff's counsel disclaimed asking for any damages on this account, he took every step suggested by ingenuity to fasten these irrelevant facts in the minds of the jury. While counsel has a right to draw his own inferences from the evidence, a verdict cannot stand based even in part upon utterly improper and unwarranted inferences from irrelevant and improper evidence. All of the evidence above quoted was improperly received and, together with the opening statement and the closing argument of plaintiff's counsel, plainly presents a case of seeking to induce a verdict by resort to the atmosphere surrounding another case rather than by reliance upon evidence relevant to the case on trial. This may well have affected not only the award

of damages but the jury's finding upon the issues of malice and want of probable cause.

In my opinion, the judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

LAUGHLIN and SCOTT, JJ., concurred; CLARKE, P. J., and PAGE, J., dissented.

PAGE, J. (dissenting):

The action was for malicious prosecution. The plaintiff was in the employ of the defendant, then known as the Riker-Hegeman Company. Two or three weeks prior to the institution of the prosecution a police officer called at the general office of the company and inquired if they had any one in their employ by the name of John A. Wolff, giving his address. He was referred to John E. Wilson, of whom the officer made the inquiry, and stated that the police department had received an anonymous letter signed "A heartbroken wife" charging that a man of that name had sold her husband cocaine and that he was employed in one of the Riker-Hegeman stores. Wilson informed the officer that they had such a man in their employ and told him where he was so employed, and also informed the officer that they had missed articles from several of the stores in which Wolff had been employed and the officer replied that they were going to watch Wolff and see if he was selling narcotics, and if they found any articles marked Riker-Hegeman when they searched his place that they would notify him, and Wilson thereupon gave the officer the telephone number of his residence. After watching Wolff the officers searched his apartment and found a phial containing cocaine and arrested Wolff taking him to the station house. Thereafter they communicated with Wilson that in the course of their search they had found a number of articles marked Riker-Hegeman, and Wilson then went with the officers to Wolff's apartment and identified these articles and went with the officers to the police station where Wolff was then detained on the charge of having narcotics in his possession. Wolff was brought out of his cell and Wilson made a charge against him of grand larceny of these articles. Wolff was arraigned on the charge of grand larceny and held for examination on a short affidavit of the police officer, stating

that he had arrested Wolff on the charge of grand larceny which he believed he had committed from the information received from John E. Wilson, and requested that Wolff be held until he could produce Wilson and other witnesses. Two days later Wolff was brought before the court for examination and no one appearing against him was discharged. Thereafter Wolff was held in bail for the Special Sessions and convicted of the charge of being a pharmacist and having narcotics in his possession without a license and sentence suspended.

Upon the trial the defendant offered no evidence and the case was sent to the jury with an excellent charge by the trial justice. The most serious question in this case is the liability of the defendant for the act of Wilson. It was shown that Wilson had no personal acquaintance with Wolff, hence had no purpose of his own to serve. He was shown to have held a position in the general offices of the company and not alone were the facts in relation to his activities in this case proved, but also that he was the head of the employment department. He was clearly acting in the master's interest and not in his own. I think the plaintiff made a *prima facie* case. This portion of the case was submitted to the jury in a careful charge, the judge impressing them that they could not find a verdict for the plaintiff unless Wilson was acting within the scope of his employment. The evidence is sufficient to sustain the verdict. It is also clear that Wilson acted without probable cause. He made no investigation to ascertain whether these articles had been purchased, but assumed that as some articles had been missing from the stores in which Wolff was employed any articles found in his possession which had once been the property of the Riker-Hegeman Company must have been stolen. Charges thus recklessly made without investigation imply malice.

It is claimed, however, that the judgment should be reversed, because the plaintiff's attorney stated in his opening that the defendant was responsible for the charge against the plaintiff of having narcotics in his possession, and in his summation attempted to inject atmosphere in the case to inflame the jury, and also that it was error to allow the details of the search of the premises to be given. This search was not made, however, solely for the purpose of securing evidence in the narcotic



case, but, at Wilson's request, was also for the purpose of securing evidence which resulted in the grand larceny charge. What occurred during the search was a part of the *res gestæ* of this case as it was of the narcotic case. Plaintiff's counsel, did state in his opening that he would show that the defendant was responsible for the anonymous letter, which he failed to do although evidence was brought out that the police officers had by their answers to the plaintiff's questions, and exhibiting the defendant's letterhead, lead him to infer that the defendant was responsible for the charge. In his summation plaintiff's attorney, after detailing circumstances that were in the evidence, in regard to the writing of the letter, Wilson's action, and that such a course could have been adopted for the purpose of getting the narcotic squad to search the premises without liability to them, distinctly said: "I say, of course, it is not proven in this case that that is the fact, but there is the evidence, and that that evidence excited in me that deduction, my mind went to the end. I am led to believe that that may be the very thing that happened in this case." There was no objection taken to the summation at the trial, nor was any request to charge made bearing upon this phrase. In my opinion to reverse a judgment because we do not think that the inference that counsel drew from the evidence is justified, when he has expressly stated that they are his inferences and not proof, would be going beyond any reasonable requirement.

In my opinion the verdict was not excessive and no reversible error committed. The judgment should be affirmed.

CLARKE, P. J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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First Department, February, 1918.

In the Matter of Proving the Last Will and Testament of  
GEORGE H. HUBER, Deceased, as a Will of Real and  
Personal Property.

GEORGE HUBER THOMSON and Others, Appellants; EMMA M.  
HUBER and Others, Respondents.

First Department, February 1, 1918.

**Will — probate — “ examination ” of subscribing witnesses — reason for admitting will to probate contrary to testimony of subscribing witnesses.**

Under section 2611 of the Code of Civil Procedure, providing that “ Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State, and competent and able to testify,” an “ examination ” contemplates such a particular inquiry into the facts and circumstances surrounding the execution as is calculated to satisfy the surrogate that the will is genuine, and that it was validly executed. Merely asking a witness to identify his signature is not a sufficient compliance with the Code.

The mere fact that such witness was recalled before the trial was concluded at the instance of a special guardian, and asked certain questions which had nothing to do with the *factum* of the will, did not constitute a sufficient examination.

Furthermore, it was an abuse of discretion not to permit said witness to be recalled for cross-examination, as it would have been unjust to compel the contestants to make him their own witness.

The reason for providing that two subscribing witnesses must be produced and examined before a will is admitted to probate is that the surrogate may be satisfied by proof that the requirements of law were observed in the execution and publication of the instrument.

When two witnesses are available, both must testify to the publication of the will by the testator, and that they signed it at his request, although it has been held that not every fact concerning the due execution of the will need be testified to by each witness.

The reason for permitting a will to be admitted contrary to the testimony of the subscribing witnesses, where the court is satisfied that it was properly executed is, that otherwise a premium would be put on the “ holding up ” of an estate under threat by the witness to testify against due execution.

APPEAL by George Huber Thomson and others from a decree of the Surrogate’s Court of the county of New York,

entered in the office of said Surrogate's Court on the 13th day of July, 1917, admitting to probate a paper purporting to be the last will and testament of George H. Huber, deceased.

*Alfred E. Hinrichs*, for Alfred E. Hinrichs, as special guardian for the appellant Carrie T. Coe, an incompetent.

*Frederick J. Moses* of counsel [*Jabish Holmes*, *Isham Henderson* and *Thomas M. Healy* with him on the brief; *Moses & Henderson* and *Thomas M. Healy*, attorneys], for the appellants Thomson and Thiel.

*Max Bernstein*, for Max Bernstein, as special guardian for the appellants Vera Bauman and others, infants.

*Morgan J. O'Brien* of counsel [*Albert B. Boardman* and *J. Sidney Bernstein* with him on the brief; *J. Sidney Bernstein*, attorney], for the respondent Emma M. Huber.

SHEARN, J.:

George H. Huber, the testator, died at the age of seventy-two from Bright's disease, from which he had been suffering for eight or nine years. His will, which has been probated, was executed on the night of June 18, 1916. For about a week prior thereto the testator had been confined to his house under the daily care of his physician, Dr. Scofield. On June eighteenth he was so sick that the doctor called into consultation Dr. Winters. In the afternoon testator's personal attorney, M. Carl Levine, called at the house, as he had done daily for several days, and in the evening both Dr. Scofield and the lawyer were again sent for. When the doctor arrived he found Mr. Huber in a weaker condition than he had ever seen him before. He was then suffering from dropsy of the lungs to such an extent that he had to be propped up in bed in order to get his breath. Later Mr. Levine arrived and went to the bedroom. Dr. Scofield testified that he heard Mr. Huber give the lawyer instructions for drawing the will. Mr. Levine contradicts the doctor and says that he requested the doctor to leave the room and that no one was in the room while he received the testator's instructions. Mr.

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Levine went into the dining room and wrote out the will in the presence of Mrs. Huber and one Albert J. Ean, an employee of the testator. The will bears evidence on its face of having been very hastily written. In the second clause the Hicksville Opera House was devised "to my brothers Andrew, Lewis and the children of my dead sisters equally share and share alike (including also Eliza Theil)." The words in parentheses were written in after the draft and before execution. It will be noted that the names of the children are not given. Yet the lawyer wished to have the names of the children and tried with Mrs. Huber's assistance to get them out of the family bible, but could not because they were written in German script. The fact that he did not go to Mr. Huber and ask him the names of these children is quite significant as to the condition that Mr. Huber was in, for the lawyer admittedly wanted the names. It also appears that while the draftsman put in "sisters" the decedent had only one sister. As a fatal attack of Bright's disease ends in coma, in spite of the fact that the testator lingered four days it appears from the foregoing that the circumstances of the execution of the will warranted full investigation. This was further warranted by the fact that this hastily prepared document devised the entire estate, except the opera house above referred to (and \$200 to the Lutheran Cemetery), to testator's wife, whereas in 1912 Mr. Huber had made a will by which, after making minor bequests, he created a trust in the residue of his estate, and provided that his widow should, during her life, have at least fifty per cent of the income and in the discretion of the trustees seventy per cent. Michael L. Thiel and George Huber Thomson, the latter claimed to be an illegitimate son of Mr. Huber, were each to receive fifteen per cent of the income during the life of the widow. After the death of the widow, Michael Thiel would receive fifteen per cent of the principal and the balance would go to George Huber Thomson. The evidence is that the testator was very fond of George Huber Thomson and nothing had occurred to bring about a rupture. There is also evidence that as late as May 30, 1916, the testator told one Schafhauser, who had been the manager of Huber's Casino for seventeen years, that he felt that he had little time left to live, that

he had his affairs all in shape and that "lawyer Hasbrouck" had the will, which "fixed it" so that Mrs. Huber could not get the principal but would have a certain income; and that he said: "Georgie is a Huber, all right. He is my son. \* \* \* I am obliged to look after Georgie." These circumstances are stated to show that the contest in the Surrogate's Court was a genuine one and that the circumstances attending the execution of the deathbed will were such as to require careful investigation.

The witnesses to the will in question were Dr. Scofield and one John Schlaefer and his wife Anna. On the trial the proponent called Dr. Scofield and he was examined at great length concerning the *factum* of the will and the surrounding circumstances. While his testimony was shaken in some particulars and contradicts that of Mr. Levine, who was also called and testified quite fully concerning the circumstances, Dr. Scofield's testimony is quite persuasive that the testator was of sound mind and understood what he was doing and that all formalities were duly observed. The two other witnesses, the Schlaefers, were in the court room during the trial. Before either was called as a witness, the attorney for the proponent endeavored to read the will to the jury, but the contestants' objection on the ground that the *factum* had not been proved by two witnesses was sustained. Thereupon, the proponents called John Schlaefer, showed him the will and asked him the one question, referring to the words "John Schlaefer, 206 East 115th Street, New York City," "I ask you whose handwriting those words and those numerals are?" Schlaefer answered, "Mine." Proponents' counsel then said, "That is all," and contestants' counsel said, "No questions." Proponents then called Mr. Levine and, after his testimony was concluded, proponents' counsel began to read the will to the jury when he was interrupted with the objection that it had not been authenticated by the testimony of two subscribing witnesses. Contestants' counsel called attention to the fact that proponents' trial counsel had stated at the opening of the trial, and later had reiterated, that it was his intention to waive the probative force and value of the attestation clause. The objection was overruled and the will was read, whereupon contestants' counsel requested

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to have Schlaefer recalled for cross-examination. This was refused by the surrogate, who said that the contestants might call Schlaefer as their own witness, whereupon the proponents rested.

It is quite apparent from the foregoing that neither side wished to be responsible for any testimony to be given by Schlaefer and that each side was endeavoring to force the other side to produce and examine the witness. The facts back of it all are not in evidence, but it appears from the offer of proof, subsequently made, that Schlaefer had apparently solicited both sides to bribe him by intimating that if he told the truth it would appear that Mr. Huber did not know what he was doing when he signed the will; that he was propped up in bed and the paper was put before him as an important paper that his lawyer wanted him to sign; that he gave no directions as to what was to go into it; that he did not declare it to be his will or ask the witnesses to sign it.

Section 2611 of the Code provides that "Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State, and competent and able to testify." Anna Schlaefer was not called although in the court room.

There is thus presented the question whether the production of John Schlaefer and merely asking him to identify his signature was such an "examination" as the Code contemplates and requires. We think that it is quite clear that it was not.

It is not necessary to resort to the law dictionaries to determine what the word "examination" means, either as used in this statute or as commonly understood. For the better security of property rights and protection against fraud, the Legislature has provided that certain requirements shall be observed in the execution and publication of a will. (See Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 21.) These requirements are few and simple, but they are essential. The reason for providing that two subscribing witnesses must be produced and examined before a written will is admitted to probate is that the surrogate may be satisfied by proof that

the requirements of law were observed in the execution and publication of the paper propounded as a will. If the mere proof of the genuineness of the signatures of the subscribing witnesses constituted an "examination" within the statute, that would be tantamount to admitting a will on the force of the attestation clause alone, without any testimony as to the circumstances. Such a rule would render meaningless and purposeless section 2614 of the Code, providing: "Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution." An "examination" under section 2611 of the Code contemplates such a particular inquiry into the facts and circumstances surrounding the execution as is calculated to satisfy the surrogate that the will is genuine and that it was validly executed. But, the respondents point out, it has been held that not every fact concerning the due execution of the will need be testified to by each witness. True, but certainly when two witnesses are available, both must testify to the publication of the will by the testator and that they signed it at his request. Then, too, it is suggested that, as the will may be admitted to probate contrary to the testimony of both the subscribing witnesses if the court is satisfied by all the evidence in the case that the will was properly executed, it is unreasonable to compel the proponent to bring out from the witness or run the risk of bringing out from a witness that the will was not properly executed. That there is a good reason for requiring two witnesses to be examined when possible there can be no doubt, but in any event the Legislature has so required. The reason for permitting a will to be admitted contrary to the testimony of the subscribing witnesses is that otherwise a premium would be put on just such practices as are hinted at here, namely, "holding up" an estate under threat to testify against due execution. Certainly the safest and best policy is to follow the statute. Especially important was it in such a case as this, for the reasons above indicated.

The mere fact that before the trial was concluded, Schlaefer was recalled at the instance of the special guardian, and asked certain questions which had nothing to do with the

*factum* of the will, did not constitute the required examination, for, although the witness was examined, he was not examined concerning the *factum* of the will, which, with the surrounding circumstances, as above pointed out, is what the Code section contemplates he shall be examined about. It was error to admit the will to probate without examining at least two of the subscribing witnesses.

Furthermore, it was an abuse of discretion not to permit Schlaefer to be recalled for cross-examination. Compelling the contestants to make him their own witness would have been most unjust. True, the contestants rejected one opportunity to cross-examine, but they were misled into doing so by the surrogate's having previously sustained their objection to admitting the will until it was proved by two subscribing witnesses. Clearly it had not been so proved when Schlaefer's direct examination was finished, and they were entitled to rest upon the assumption that it would be necessary for the proponents to recall him and examine him as to the *factum* of the will. Even if the parties were shrewdly contending for position, the matter must not be finally disposed of as though it were all a game. Schlaefer's testimony (or that of his wife) concerning the *factum* of this will should have been taken for whatever it was worth. In this view of the case it is unnecessary to discuss the further point with respect to the rejection of the evidence of certain alleged admissions made by Schlaefer tending to disprove due execution of the will.

The decree is reversed and a new trial ordered, with costs to appellants to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and PAGE, JJ., concurred.

Decree reversed, new trial ordered, costs to appellants to abide event.



In the Matter of the Judicial Settlement of the Account of THE FARMERS' LOAN AND TRUST COMPANY, as Temporary Administrator, etc., of EDWIN O. BRINCKERHOFF, and of the Account of THE FARMERS' LOAN AND TRUST COMPANY, as Administrator with the Will Annexed, etc., of EDWIN O. BRINCKERHOFF, Deceased.

EVELINA D. CLARK and Others, Appellants; JULIA M. DANIELS and Others, Respondents.

First Department, February 1, 1918.

**Decedent's estate — when allowances by Supreme Court from estate of lunatic to remote next of kin constitute gifts and not advancements — such allowances not chargeable against subsequent interests of recipients in the estate — authority of court of equity to make advancements from estate of lunatic for benefit of next of kin — authority of Surrogate's Court to modify orders of Supreme Court — doctrine of hotchpot or collatio bonorum.**

Allowances made to remote next of kin, brothers and sisters of the half blood and children of deceased sisters of the whole blood and sisters of the half blood, who were apparently not entitled to share in the estate, for their maintenance and support, from the estate of a testator who had been judicially declared incompetent under orders of the Supreme Court in which orders there was no provision charging the recipients with the amounts received in case they subsequently succeeded to an interest in the estate, are not advancements, but are gifts during the lifetime of the testator, and hence the court has no power to decree that they shall be surrendered or accounted for as a condition of taking an interest in the testator's estate which is fixed by the Decedent Estate Law.

The Supreme Court, in authorizing such allowances, acts as a court of equity, having custody and control of the estate of the incompetent; it acts for the incompetent in reference to his estate as it supposes the incompetent would have acted if he had been of sound mind.

A court of equity may legally allow payments out of a lunatic's surplus income to persons not entitled to any interest in his estate.

Orders of the Supreme Court, making gifts from the estate of a lunatic to remote next of kin for their maintenance and support, being valid, plain and unambiguous, the Surrogate's Court is without authority to write and incorporate into them a provision contradicting their terms and wholly unnecessary. This is so whether or not the doctrine of hotchpot or the similar doctrine of *collatio bonorum* obtains in this State.

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The doctrine of hotchpot or the similar doctrine of *collatio bonorum* is based upon the fact that there must have been an intention of an intestate that there should be equality in inheritance among his children.  
SCOTT and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by Evelina D. Clark and others from parts of a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 22d day of June, 1917, settling the accounts herein.

*Ezekiel Fixman* of counsel [*Clarence M. Lewis* with him on the brief; *Ezekiel Fixman*, attorney], for the appellants.

*Edward F. Moran* of counsel [*Charles C. Nave* with him on the brief; *Edward F. Moran*, attorney], for the respondents *Julia M. Daniels* and others.

*Cornelius A. Baldwin* of counsel [*Jacob H. Shaffer*, attorney], for the respondent The Five Points Mission, Old Bowery.

*George N. Whittlesey* of counsel [*Stanley W. Dexter* and *Matthew C. Fleming* with him on the brief], for the respondents The Five Points House of Industry and American Female Guardian Society and Home for the Friendless.

*Francis Smyth* of counsel [*Cadwalader, Wickersham & Taft*, attorneys], for the respondent The New York Association for Improving the Condition of the Poor.

SHEARN, J.:

The testator, Edwin O. Brinckerhoff, by his will executed October 2, 1875, gave one-half of his estate to a friend, Edward R. Livermore, who predeceased the testator, and the remaining one-half to four charitable corporations. On February 23, 1877, the testator was judicially declared an incompetent person and a committee of his person and estate was duly appointed. Such committee, with a substitution duly made in 1891, continued to act as such until the death of the testator on December 7, 1915. The testator was unmarried and was survived by the following next of kin: The appellants Evelina D. Clark, a sister of the half blood; Frederick W. Cooper, a son of a deceased sister of the whole blood; Louise B. Armstrong, a daughter of a deceased sister

of the whole blood; Julia M. Harrison, a sister of the half blood; Daniel D. Brinckerhoff, a brother of the half blood; William N. Barlow, a son of a deceased daughter of a deceased sister of the whole blood; Robert B. Brown, Julia M. Daniels and Stuart H. Brown, children of a deceased sister of the half blood. During the lifetime of the testator and while he was confined in the Bloomingdale Insane Asylum, appellants, on notice to the committee, applied on petition to the Supreme Court, New York county, for and obtained orders directing the committee to pay out of the surplus income of the incompetent various amounts toward their maintenance and support. A typical petition and order appear in the record, being the application of the appellant Cooper dated December 5, 1913. The petition, after setting out the condition of the estate, showed that the petitioner had been an invalid for many years, incapacitated for earning any money toward his support or the support of his family; that the petitioner was without any income or means with which to procure necessary medical attendance and appliances which his condition of health required; that the incompetent, before he became incompetent "was very kind and generous to your petitioner's mother and her children and manifested an interest in the comfort and well being of all of them and freely assisted them financially and otherwise at various times, and from time to time and whenever and to the extent desired by your petitioner's mother, and your petitioner verily believes that said incompetent person would now freely aid your petitioner and provide him and his family with all reasonable necessities for a comfortable home and maintenance if he could understand your petitioner's condition." The petition was sent to a referee to take testimony and the order making the allowance was based upon the referee's report. The orders contained no provision that the sums paid under them should be brought into account in the event that the beneficiaries thereunder should come into a share of the estate. Although the monthly payments made under said orders were small, the total during the entire period of years covered by them was considerable. These amounts were: Evelina D. Clark, \$7,818.33; Louise B. Armstrong, \$4,950; Frederick W. Cooper, \$4,524.17; Daniel D. Brinckerhoff,

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\$1,100; Julia M. Harrison, \$2,325, and Angelina Cooper, \$2,450.

Objections to the probate of the will were filed by the next of kin of decedent. In order to avoid a contest, an agreement dated February 14, 1916, was entered into between the four charitable corporations, to whom was bequeathed one-half the estate, and all of the next of kin, whereby it was provided that the objections filed to the probate should be withdrawn; that all parties should unite in procuring the probate of the will; that the collective share of the charitable corporations in the estate should be one-fourth of the residuary estate and the remaining one-fourth bequeathed to the charitable corporations should be distributed to the heirs at law and next of kin of the testator in the same manner as if he had died intestate with reference to such one-fourth share. On the judicial settlement of the account of the temporary administrator of the estate, and administrator with the will annexed, the question was raised: What is the proper method of distribution, taking into consideration the sums paid from surplus income of the estate of the testator during his lifetime to the appellants pursuant to the orders of the Supreme Court? Certain next of kin, who had not received allowances during testator's lifetime, claimed that the legal plan of distribution was by charging these allowances against appellants and deducting them from their respective shares, thereby increasing the shares of the next of kin not having received any allowances under the doctrine of hotchpot. The learned surrogate upheld this plan of distribution in part upon the theory that under the civil law attached to the Surrogate's Court, the surrogate has equitable power to decree a *collatio bonorum*. (99 Misc. Rep. 420.) The appellants appealed from the portions of the decree which charge such allowances against them.

The learned surrogate has written an erudite and extremely interesting opinion, tracing the origin and development of the rules of hotchpot and *collatio bonorum*, and, reasoning therefrom, finds a basis for the decision appealed from. As a matter of fact, however, the distribution of and the right to take the property of a decedent is in this State regulated by statute.

It will aid a correct understanding of the controversy to

determine at the outset whether the allowances paid under the orders of the Supreme Court were advancements or whether their legal status was that of gifts made by the testator during his lifetime. "An advancement is an irrevocable gift *in presenti* of money or property, real or personal, to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift." (14 Cyc. 162.) "An advancement is defined to be 'a gift by anticipation from a parent to a child, of the whole or a part of what it is supposed such child will inherit on the death of the parent.' (Bouv. L. Dict.)" (*Messman v. Egenberger*, 46 App. Div. 46, 51. See, also, *Bowron v. Kent*, 190 N. Y. 422, 431, 432.) It is, therefore, clear that allowances for maintenance and support, made to remote kin, brothers and sisters of the half blood and children of deceased sisters of the whole blood and sisters of the half blood, are not advancements in any legal sense. It may be noted here that even in the case of true advancements, *i. e.*, gifts from parent to child in anticipation of the child's inheritance, it has been held that "The right to charge advancements made by an intestate to his children against their distributive shares in his estate depends upon positive law, and the statute regulates the right and prescribes the circumstances and limitations under which the right exists." (*Beebe v. Estabrook*, 79 N. Y. 246, 249.) "It is not disputed that the right to charge against an heir at law a sum of money advanced by the ancestor did not exist at common law, but is entirely regulated by statute." (*Messman v. Egenberger*, *supra*.) The "positive law" referred to is sections 96 and 99 of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18). Furthermore, the provision as to advancement applies only in case of entire intestacy. (*Messman v. Egenberger*, *supra*; *Bowron v. Kent*, *supra*.)

That the legal status of these allowances was that of gifts made during the lifetime of the testator is equally clear. The Supreme Court, in authorizing such allowances, acts as a court of equity, having custody and control of the estate of the incompetent. (*Sporza v. German Savings Bank*, 192 N. Y. 8.) In so doing the court acts for the incompetent in reference to his estate as it supposes the incompetent would have acted if he had been of sound mind.

In *Matter of Heeney* (2 Barb. Ch. 326) Chancellor WALWORTH authorized the committee of the incompetent to permit two young ladies, not related in any way to the incompetent, to be supported as members of the incompetent's family, to have the education of one of them completed at the same expense at which the incompetent had educated her sister; to continue allowances to three aged ladies, who were in no way related to the incompetent. The chancellor said: "In the case of the late Dr. Willoughby, after a full examination of the subject, I came to the conclusion that the Court of Chancery had the power, out of the surplus income of the estate of a lunatic, to provide for the support of one who was not his next of kin, and whom the lunatic was under no legal obligation to support, where the chancellor was satisfied, beyond all reasonable doubt, that the lunatic himself would have provided for the support of such person if he had been of sound mind, so as to be legally competent to do so."

That the allowances in the *Heeney* case were gifts and not payments on account of applicants' interests in the incompetent's estate is, of course, obvious, for the beneficiaries were not related to the incompetent and not entitled to any interest in his estate. The chancellor ordered the payments to be made to them as gifts, just as the incompetent had made gifts to them during the period of his competency. This answers the suggestion of the respondents that for the court to make gifts out of the incompetent's estate to persons not entitled to any interest in the estate is illegal.

There are numerous other precedents upholding the legality of payments out of a lunatic's surplus income to persons not entitled to any interest in his estate.

In *Matter of Strickland* ([1871] L. R. 6 Ch. App. Cases, 226) committee of a lunatic was authorized to contribute £500 from the lunatic's surplus income toward the building of a school and church.

In *Matter of Earl of Carysfort* ([1840] Craig & P. 76) Lord COTTENHAM granted an allowance to an old personal servant, being satisfied that the allowance was one which the incompetent himself would have approved had he been capable of acting. The servant had no prospective interest

in the estate of the incompetent. Clearly the allowance was a gift which the court believed the incompetent would have made himself.

In *Ex parte Whitbread* ([1816] 2 Mer. 99) Lord ELDON, in discussing the reasons for granting allowances out of the estates of lunatics, said (pp. 102, 103): "But the Court does not do this because, if the Lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate \* \* \* and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

Further showing that the legal status of such allowances is that of a gift, CORTON, L. J., said, in *Matter of Whitaker* ([1889] 42 Ch. Div. 119, 126): "Undoubtedly the court has jurisdiction to do that, because we often (although not to so large an amount as this) give, out of the personal estate of a lunatic that which is mere bounty on his part when we see that it is in accordance with his views and his declarations before he became lunatic. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature, and we continue that support, and perform for him when he becomes a lunatic that which we can see was his own intention while of sound mind."

In Shelford on Lunatics (pp. 101, 159) the author says: "There are instances in which the court has, in its allowances to the relations of the lunatic, gone to a further distance than grandchildren — to brothers and to other collateral kindred; but the principle is not because the parties are next of kin of the lunatic, or as such have any right to the allowance, but because the court will not refuse to do for the benefit of the lunatic that which it is probable the lunatic himself would have done."

Now, then, if these allowances were gifts, as it must be apparent they were, they belonged to the donees when paid. It was, of course, entirely competent for the Supreme Court, in equity, to impose as terms for granting the petitions for equitable relief a stipulation that the petitioners would agree

to be chargeable with the amount of the allowances in the event that they subsequently by any chance succeeded to an interest in the estate; but in none of these orders was any such provision made. In the absence of any such provision, these allowances when so paid were the absolute property of the donees. When the testator died, the interests of the appellants, who were among the donees, in the decedent's estate were absolutely fixed by the statute. There is nothing in the statute suggesting that there should be subtracted from their vested interests in the estate sums given to them by the testator in his lifetime. How, then, can any court enter upon this field, which is comprehensively and precisely governed by statute, and decree that, because it appears equitable so to do, the vested interests of the appellants in the estate shall be diminished by the amounts which, in law, were given to them absolutely during the life of the testator? It cannot be done except by overriding legislative enactments by judicial legislation. When an estate is being distributed according to law, it is no justification for ordering a different distribution because it would be more equitable. If a man died intestate, leaving an estate of \$10,000, and had made one of two surviving nephews a gift of \$5,000 a week before his death, it would seem more equitable, on the basis that equality is equity, to charge the donee with his \$5,000 on the distribution of the estate between the two. No one would suggest, however, that this could be done. Even in the case of gifts to children, where the principle that equality is equity has its real application, it has been held that the gifts are not to be held advancements on account of their interest in the parent's estate unless it appears to have been the intention of the parent that the gifts should be so considered. (*Matter of Morgan*, 104 N. Y. 74.) These allowances for support and maintenance, being in law gifts during the lifetime of the testator, and being made absolutely and without any conditions attached, there is in my judgment no power in any court to decree that they shall be surrendered or accounted for as a condition of taking an interest in the decedent's estate, which interest is fixed by law.

With reference to the rules of hotchpot and *collatio bonorum*, it may be observed that, strictly speaking, there was at common



law only one case where the rule of hotchpot was applied; that is, where daughters inherited as coparceners, one daughter having previously received property on her marriage. The same principle is noticed by Blackstone (Bk. II, 190) as applied in the customs of York and London to personal property, and these customs seem to have been incorporated into the English Statute of Distributions which was adopted by this State and is, in its present form, section 99 of the Decedent Estate Law, above referred to.

In equity hotchpot was the name given to the rule "whereby a person, interested along with others in a common fund, and having already received something in the same interest, is required to surrender what has been so acquired into the common fund, on pain of being excluded from the distribution." (Ency. Britannica, vol. 13, p. 803.)

The term is also used in a more circumscribed sense in connection with the Statute of Distributions, as appears in a definition of the word by Bouvier: "The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates." (Bouv. Law Dict. [Rawle's Rev.] 963.)

"The same principle is to be found in the *collatio bonorum* of the Roman law; emancipated children, in order to share the inheritance of their father with the children unemancipated, were required to bring their property into the common fund." (Ency. Britannica, vol. 13, p. 803.)

The surrogate in arguing that the doctrine of *collatio bonorum* is part of the system of English equity jurisprudence which is to be applied in this State in the absence of statute, says: "If the record of the judgments of the clerical chancellors were extant, I am persuaded that it would disclose that the civil law of *collatio bonorum* was not only argumentatively authoritative in our equity, but absolutely binding and a source of law." And again: "That courts of equity would, in an administrative suit, quite independently of 'hotchpot' or the Statute of Distributions, compel the recipients of advances to bring back the sums advanced into the account on a general distribution there can be no doubt.

*Edwards v. Freeman*, 2 P. Wms. 435; *Phiney v. Phiney* (1708) 2 Vern. 638. In a note to this last case an editor of a century ago states: 'It is apprehended a gift of personalty in the lifetime of the intestate to his heir at law must be brought by the heir in all similar cases into 'hotchpot.' This is a mere statement of a general principle in equity. He obviously means by 'hotchpot' *collatio bonorum*." (99 Misc. Rep. 429.)

It is apparent that the former quotation is merely an expression of opinion and the latter carries its own refutation, because the cases all use the term "hotchpot" and make no mention of *collatio bonorum*, and the editor above referred to undoubtedly meant what he said. Both the cases cited by the learned surrogate state the proposition that the theory of hotchpot will be applied in relation to the Statute of Distributions where advancement was by way of marriage settlement to a child. There is no distinct equity principle involved in these cases, but merely the doctrine of hotchpot as above defined in the interpretation of the Statute of Distributions.

But if it be assumed that the doctrine of *collatio bonorum* applies in this State, being inherited from the civil law through English chancery, this would not support the surrogate's conclusion, since the doctrine of *collatio bonorum* is applicable only to cases where advances were made to children (Domats Civil Law by Strahan [Cushing's ed.], vol. 2, p. 249) and probably only in cases of intestacy.

However, there is little doubt that the effect of hotchpot and *collatio bonorum* is the same, and at the present time the use of the terms seems to be interchangeable, the basic theory of each being equality among children of the intestate. The Legislature has provided cases where the principle of hotchpot is applicable in the distribution of decedents' property in section 99 of the Decedent Estate Law, and if it had intended the principle to apply to other cases, there would be a statute expressing such intention.

The learned surrogate, however, preferred not to rest his decision on the right of the Surrogate's Court, in the absence of statute, to decree a *collatio bonorum*, but advanced another ingenious ground. Conceding that the Surrogate's Court could not invalidate the orders of the Supreme Court awarding

sums out of the estate of the incompetent, but finding therein no direction that the sums allowed should be brought in the reckoning on the final distribution of the estate, the surrogate declares that such orders fail to conform to the practice of the Court of Chancery, both of England and of this State, by omitting such a provision, and then proceeds to "interpret" the orders as impliedly containing such a provision. The surrogate says of the Supreme Court justices who made the several orders: "They doubtless intended that the advances to those entitled to share in the succession should be on the usual terms; that is to say, that the adult beneficiaries advanced should bring their advances into the final reckoning of the lunatic's estate." Of course the Surrogate's Court has no power to revise, alter or change the plain terms of an order of the Supreme Court, either directly or through the indirect process of interpretation. Neither does it appear quite correct to say that the invariable practice was to insert such a provision, for hereinabove are cited numerous cases where such a direction was not made. Moreover, it would seem from the theory on which such orders are made, *i. e.*, gifts, that there is no necessity for incorporating therein any direction of hotchpot or *collatio bonorum*. The surrogate cites *Matter of Willoughby* (11 Paige, 259) where the chancellor said: "But my present recollection is, that in all those cases, I required the *adult children*, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotchpot, upon the death of the lunatic; if any part of his personal estate should come to them under the Statute of Distributions."

This quotation is of course fairly susceptible of being interpreted as meaning that it is only in the case of adult children who may later share in the decedent's estate through the Statute of Distributions that the doctrine of hotchpot is applied. This is most probable, as the doctrine of hotchpot or the similar doctrine of *collatio bonorum* is based upon the fact that there must have been the intention of the intestate that there should be equality in inheritance among his children. In the case of advancements, therefore, one would expect to find such a provision, but not in such orders as these which are made upon the basis of being gifts.

Although the power should be sparingly and cautiously exercised, the Supreme Court unquestionably had the power to make these gifts, acting for the incompetent and as he would have done. There was nothing before the court to show that the petitioners would be likely to share in his estate. In fact, if the will had been produced, it would have clearly appeared that they were not to share in the estate. There was no basis for treating the allowances as advancements, and, if gifts, there was of course no occasion to insert in the orders a provision that they should be returned. The orders being valid, plain and unambiguous, the Surrogate's Court was without authority to write and interpret into them a provision contradicting their terms and wholly unnecessary, whether or not the doctrine of *collatio bonorum* obtains in the State of New York.

It follows that the parts of the decree appealed from should be reversed, with costs, and the decree modified by providing that the payments made to the appellants should not be treated as advancements or charged against appellants.

CLARKE, P. J., and PAGE, J., concurred; SCOTT and LAUGHLIN, JJ., dissented.

SCOTT, J. (dissenting):

I am unable to concur in the opinion adopted by the majority of the court. So far as regards the history of the practice which has grown up of making payments out of the estate of incompetents to persons or objects to which it is assumed that he would himself have made payments, if competent, there is nothing to be added to the learned opinion of Mr. Surrogate FOWLER (99 Misc. Rep. 420), and I should be content to rest my dissent upon that opinion but for the fact that it appears to be assumed by a majority of my associates that the surrogate, by the order appealed from, has in some way undertaken to review and modify the orders of the Supreme Court which permitted the payments to be made to the incompetent's next of kin. I do not understand that the surrogate's order is open to any such imputation. The orders of the Supreme Court did not undertake to pass in any way upon the question as to whether or not such payments should be taken

into account when the time came for a distribution of the estate. That question was left open, to be considered and decided when the proper time arrived, to wit, when the estate was to be distributed. That time has now arrived and it is necessary to determine how such a distribution is to be made. To so determine we must have regard to the principles of equity, since the whole subject is an invention of equity. There is no warrant in law for giving away any part of the estate of an incompetent, and the justification for so doing can be found only in the authority vested in equity to deal with the estates of such persons, and such payments always rest in the sound discretion of the chancellor, or of the court exercising equitable jurisdiction. It certainly is not equitable to so distribute the estate that those of the next of kin who by diligent importunity have induced the court to permit them to share in the estate before the death of the incompetent should profit to the extent of such advances over other next of kin of an equal degree of relationship to the incompetent and presumptively entitled to share equally in his estate. Exact equality, which is equity, can only be attained by taking into account in the final distribution of the estate the amounts which have been advanced to some of the next of kin before their absolute right to share in the estate accrues. Such payments should in my opinion be treated as advancements, although technically that name is commonly applied to advance payments to children. To say that such payments are in the nature of gifts does not, as I think, determine the question whether or not they should be taken into account when the estate is distributed. In a sense of course they are gifts, in that no consideration is given for them, and the recipient becomes absolutely entitled to take and use them, but none the less they are advances out of the estate, and are justified, so far as concerns next of kin at least, by the circumstances that in the natural course of events the recipient will become entitled to share in the estate. These views are, I think, supported by the fact that such allowances are usually, if not always made, as they were in this case, without notice to the next of kin to whom no advances are made, and who have no opportunity, until the question arises as to the dis-

tribution of the estate, to be heard as to the propriety of the preferential payments by which according to the views of the majority, their distributive shares are to be reduced.

LAUGHLIN, J., concurred.

Decree so far as appealed from reversed and decree modified as stated in opinion. Order to be settled on notice.

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THE BANKERS SERVICE CORPORATION, Appellant, v. THE  
SECOND NATIONAL BANK OF ALLEGHENY, Respondent.

First Department, February 1, 1918.

**Contract — action on contract to recover balance alleged to be due for services in obtaining new accounts in defendant's bank — right of bank to reject small amounts as undesirable and refuse payment for obtaining them.**

In an action on contract to recover a balance alleged to be due the plaintiff for services in obtaining new accounts in defendant's bank, pursuant to a written agreement, it appeared that amounts as low as one dollar each were contemplated and regularly accepted; that long after the accounts were turned in and payment therefor made to the plaintiff on account of many of them, the bank determined that several new accounts were undesirable solely because of their amount, and refused to pay the agreed commissions, and that, although the bank notified the plaintiff that it considered the accounts undesirable, it thereafter retained and never canceled them.

*Held*, that the bank could not retain the deposits and have the use of the money and to this extent the benefit of plaintiff's services and at the same time take the position that it had rejected the accounts as undesirable, and that, therefore, the direction of a verdict upon its counterclaim for alleged overpayments on such accounts was erroneous.

APPEAL by the plaintiff, The Bankers Service Corporation, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 9th day of March, 1917, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 19th day of March, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*Clifford H. Owen* of counsel [*Holm, Whitlock & Scarff*, attorneys], for the appellant.

*Charles Adkins Baker* of counsel [*Parker & Aaron*, attorneys], for the respondent.

SHEARN, J.:

This was an action on contract to recover a balance due plaintiff for services performed in obtaining new accounts in defendant's bank pursuant to a written agreement by the terms of which plaintiff undertook to procure depositors and defendant's predecessor agreed to pay three dollars for each account. A large number of the accounts were one dollar each, but it appeared beyond question that accounts as low as this were contemplated and that the bank regularly accepted them. The contract provided that "The issuing of the pass book by The Bank indicates a new and acceptable depositor, as hereinafter stated," and further provided that the bank "has the right to refuse payment for depositors accepted from The Corporation where such accounts in the judgment of the Bank are undesirable." Long after the accounts were turned in and after the bank had paid the plaintiff on account of many of them, but without prejudice, the bank determined that 1,145 accounts were undesirable solely because of their amount, and refused to pay the plaintiff its agreed commissions. Plaintiff sued to recover the agreed fee and defendant counterclaimed for what amounted to an overpayment, which overpayment was established if the defendant was in a position to take advantage of its claim that it had rejected the accounts as undesirable.

It clearly appears that notwithstanding the bank accepted the one dollar accounts and issued a pass book it still had the right to determine that the accounts were undesirable, and on such determination to reject them. The difficulty with the bank's position, however, is that all that it did was to notify the plaintiff that it considered the accounts undesirable and in spite of this the bank thereafter retained the accounts and never canceled them. In my opinion, the bank could not retain the deposits and have the use of the money and, to this extent, the benefit of plaintiff's work, and at the same time take the position that it had "rejected"

the accounts as "undesirable." The direction of a verdict upon defendant's counterclaim was, therefore, erroneous.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and PAGE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

FLORINDA PAGLIUCA, as Administrator, etc., of CANIO RABASCO, Deceased, Appellant, v. ITALIAN BARBERS' BENEVOLENT SOCIETY OF NEW YORK, Respondent.

First Department, February 1, 1918.

**Insurance — benevolent society — right of next of kin of decedent under by-laws to maintain action for death benefit.**

A provision of the by-laws of a benevolent society that for the death of any effective member it would "pay to the widow, family or legal heirs, or to whom the member shall direct in his last will and testament or by a written declaration previously made," a certain sum, does not exclude the next of kin in case the insured left no widow or children from maintaining an action for a death benefit.

An action to recover for the death of a member of such a society may be maintained by the administrator of the decedent in behalf of the next of kin.

APPEAL by the plaintiff, Florinda Pagliuca, as administrator, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 5th day of July, 1917, upon a dismissal of the complaint by direction of the court at the close of the case, both sides having moved for the direction of a verdict. An appeal is also taken from the order of the court dismissing the complaint.

*Abraham Snyder* of counsel [*Marx & Snyder*, attorneys], for the appellant.

*Antonio Ferme*, for the respondent.



SHEARN, J.:

This action was brought by the plaintiff, as administrator of the goods, etc., of Canio Rabasco, deceased, to recover of the defendant a death benefit as provided by its by-laws. The deceased became a member in January, 1916, paying his dues for that month and the ensuing three months. He died on July 21, 1916. Although he had failed to pay dues, etc., thereafter no registered notice or letter was at any time sent to him requesting payment as provided by article 25 of chapter 4 of the by-laws and no resolution was at any time passed expelling or suspending him from membership. The family of the deceased consisted of his father, mother, brothers and sisters who are in Italy. He left no widow or children. The complaint was dismissed upon the ground that deceased having left no widow or children, his next of kin were not entitled to the death benefit and upon the further ground that the appellant was not the proper party to maintain the action.

The first question is whether the policy contemplates the payment of a death benefit to the next of kin in the event of the member leaving no widow or children. Chapter 1 under the title "Title and Scope" provides in article 24: "For the death of any effective member of this Association who is in order with the administration of all his taxes and monthly dues ninety days after the decease date, the C. C. (central council) shall pay to the widow, family, or legal heirs, or to whom the member shall direct in his last will and testament or by a written declaration previously made and sent to the same C. C. (central council), the sum of One Dollar for so many effective members then in order with the administration of all his taxes and monthly contributions." It is quite clear that there was no intention to limit the benefit to the widow and children in view of the agreement to pay as directed by the will or written declaration of the decedent.

Neither does the term "legal heirs" embrace only the children. In *Pfeifer v. Supreme Lodge Bohemian S. B. Society* (173 N. Y. 418) the death benefit was payable to the "heirs" of the deceased. The court held that the word "heirs" was "not used in its strictly technical sense as representing persons entitled to inherit real estate, but rather as indicating the

next of kin," and that the word "heirs" "is equivalent to next of kin in this connection." The trial court, therefore, erred in holding that it was intended by this provision of the by-laws to exclude next of kin in case the insured left no widow or children.

The next question involves the right of the plaintiff to maintain the action. We agree with the trial justice that the cases of *Janda v. B. R. C. U.* (71 App. Div. 150) and *Bishop v. G. L. E. O. of M. A.* (112 N. Y. 627), both of which cases sustained the right of the administratrix to maintain the action, are not decisive of the question here, for in each of those cases the administratrix was the widow and had a sufficient interest in the fund to sustain the action. The *Pfeifer Case (supra)*, however, is an authority upholding the plaintiff's right to maintain this action. In that case the plaintiff was a niece of one of the next of kin, that is to say, was a daughter of the deceased's sister. The Court of Appeals held that the plaintiff as administratrix was a *quasi* trustee for the next of kin who were represented by the word "heirs." It is true that on a subsequent trial of this case it appeared that the plaintiff had an assignment of her mother's interest, which would be sufficient to bring the case within the *Janda* and *Bishop* cases, but this fact did not appear in the case when the Court of Appeals sustained the right to maintain the action. The court, therefore, erred in holding that the plaintiff was not entitled to maintain the action.

The respondent, however, contends that in no event can there be a recovery because the deceased was not a member for the period of one year and was not in good standing at the time of his death. The validity of this contention depends upon the true construction of the defendant's constitution and by-laws, which are written in the Italian language. Two radically different translations were submitted to the court, but there was no proof by an official interpreter or otherwise which would enable the court to determine which was correct or whether either one was correct. We are, therefore, not in a position to pass upon the respondent's construction of the by-laws so as to do full justice to both parties. Upon the retrial of this case, the entire constitution and by-laws should be introduced in evidence and the correct translation thereof

should be established. It may also be possible to adduce competent evidence of the practical construction thereof by the defendant and the insured during the latter's period of membership.

The judgment is reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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SOLOMON POSNICK, Appellant, v. H. S. & S. O. CRYSTAL, Respondent, Impleaded with BENJAMIN SCHWARTZ, Defendant.

First Department, February 1, 1918.

**Master and servant — negligence — action by carpenter against his employer, a contractor, and the owner — reversible error — evidence that plaintiff's employer was insured under Workmen's Compensation Law.**

In an action by a carpenter against his employer, a contractor, and the owner of the buildings in course of construction, for personal injuries alleged to have been sustained by being struck by a scantling thrown out of an upper window by an employee of the owner, the action having been discontinued as to the contractor, it was reversible error to allow the defendant over plaintiff's objection to introduce evidence that plaintiff's employer was insured under the Workmen's Compensation Law, where it was not followed by proof that plaintiff had applied for or received compensation.

APPEAL by the plaintiff, Solomon Posnick, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Bronx on the 13th day of June, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of June, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*Herman J. Rubenstein*, for the appellant.

*Frederick W. Catlin* of counsel [*Robert H. Woody*, attorney], for the respondent.

SHEARN, J.:

The plaintiff appeals from a judgment entered upon the verdict of a jury in an action brought to recover damages for personal injuries sustained as a result of the negligence of the defendants. The respondent was the owner of buildings in the course of erection and the plaintiff was a carpenter on the job, who was in the employment of the defendant Schwartz, a contractor for the carpenter work. Upon the trial the action was discontinued as to the defendant Schwartz but proceeded against the owner. It was fairly established that the plaintiff was injured while passing through the courtyard or space between the two buildings under construction by being struck by a scantling thrown out of an upper window by an employee of the respondent engaged in cleaning the premises. There was some evidence which might have warranted the jury in finding the plaintiff guilty of contributory negligence, and, on account of the ignorance of some of the witnesses called by the plaintiff, certain aspects of the case were left in some confusion. On the whole, the merits so preponderated in favor of the plaintiff that the error in the admission of evidence about to be referred to can but be regarded as prejudicial.

The respondent, over plaintiff's objection, insisted on introducing evidence that plaintiff's employer Schwartz was insured under the Workmen's Compensation Law. Plaintiff was not proceeding against his employer but was suing a third party as he had a right to do without resorting to the act. The only possible relevancy of any inquiries concerning compensation under the act would be to show that plaintiff had received compensation. Respondent's counsel omitted to ask the plaintiff any questions on this head while plaintiff was on the stand, but introduced evidence of the insurance of plaintiff's employer as a part of defendant's case, leading the court to believe that it was to be followed up by proof that plaintiff had applied for or received compensation. It was not so followed up and no attempt was made to show any such fact. The only possible purpose of introducing this evidence under the circumstances was to achieve the natural result of leading the jury to suspect or infer that plaintiff had been or could be compensated by merely making application under the

Workmen's Compensation Law and, therefore, his case should not be seriously regarded. This was distinctly harmful and may well have accounted for the verdict.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, SCOTT and PAGE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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SOEURBEE, INCORPORATED, Respondent, v. JATISON CONSTRUCTION COMPANY, INC., Appellant.

First Department, February 1, 1918.

**Pleading — denials essential to affirmative defense should not be stricken out.**

Where in an action for the breach of a building contract, the plaintiff alleges non-performance on the part of the defendant, and also due performance of all the terms of the contract on plaintiff's part, except as waived by the defendant, and the defendant pleads as an affirmative partial defense that the plaintiff failed to assert its claim within ninety days as required by the terms of the contract, denials of plaintiff's allegations as to non-performance were in no sense essential to the affirmative defense, and were properly stricken out, but denials as to due performance by the plaintiff except as waived by the defendant were essential to the defense and should not be stricken out.

It is well settled that denials which are essential to render available the other facts pleaded as a separate defense should not be stricken out.

APPEAL by the plaintiff, Jatison Construction Company, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of December, 1917, granting plaintiff's motion to strike certain denials from an affirmative partial defense.

*Frederick E. Anderson* of counsel [*Stoddard & Mark*, attorneys], for the appellant.

*Lawrence E. Brown* of counsel [*Bullowa & Bullowa*, attorneys], for the respondent.

SHEARN, J.:

The first cause of action, which is the only one with which we are concerned, alleges the breach of an agreement in writing whereby a building should be fully completed, decorated and equipped as provided therein. Paragraphs 4 and 5 of the complaint, which are the ones denied in the affirmative partial defense, are as follows:

"*Fourth.* The defendant did not perform said contract on its part to be performed, but on the contrary, on January 2nd, 1917, conveyed the aforesaid 79th Street premises to the plaintiff, and the said building thereon had not been and is not fully completed, decorated or equipped as provided in said contract, and the contracts relating to work in said building were not substantially carried out, to the damage of the plaintiff in the sum of \$75,000.

"*Fifth.* The plaintiff duly performed all the terms and conditions of said contract on its part to be performed, except in so far as the same were waived by the defendant with respect to notices of the defects in the completion, decoration and equipment of said building upon said 79th Street premises."

The affirmative partial defense is, in part, that the contract provided that "any claim of damage by the plaintiff against the defendant should be asserted within ninety days after the time when title to said 79th Street premises was tendered in accordance with said contract, and that if within such ninety days any dispute or controversy should have arisen, or any claim for damage should have been made, such building should be deemed to have been accepted by the plaintiff except as to the matters to which objection has been made," and that "within such ninety days certain disputes or controversies did arise and certain claims for damages were made by the plaintiff, and on information and belief, that as to the greater part of the alleged claims of the plaintiff for which this action was brought, no objection was made within the said ninety days, and that by reason of such fact, the plaintiff waived such objections and the said 79th Street building was by the terms of said agreement deemed to have been accepted by the plaintiff except as to such matters to which objection was made within the said ninety days."

It is now well settled that denials which are essential to

render available the other facts pleaded as a separate defense should not be stricken out. (*Mendelson v. Margulies*, 157 App. Div. 666; *Pullen v. Seaboard Trading Co.*, 165 id. 117.)

It is quite apparent that the denials of the allegations in paragraph 4 are in no sense essential to this affirmative defense, for they are allegations alleging non-performance on the part of the defendant, whereas the theory of the defense is that it admits non-performance but meets the claim with the ninety-day clause.

Quite different, however, is the situation with reference to the denial of the allegation in paragraph 5, for here the plaintiff alleges due performance of all the terms of the contract on plaintiff's part *except as waived by the defendant*. For the defendant to admit that plaintiff duly performed the provision with respect to giving ninety days' notice or that the defendant waived the clause with respect to the ninety days' notice would absolutely destroy the legal effect of the defense, consisting of the plaintiff's failure to assert its claim within ninety days. This denial is essential to the defense and should not have been stricken out.

The order should be modified by eliminating the provision striking out paragraph III of the answer and substituting therefor the following: "That all denials incorporated in Paragraph III of the answer be and they are hereby stricken out as irrelevant and redundant, except the denial of due performance by plaintiff except as waived by the defendant," and as so modified the order is affirmed, without costs.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Order modified as stated in opinion, and as modified affirmed, without costs.

App. Div.]

First Department, February, 1918.

JAMES B. KEESEY, as Administrator, etc., of LILLIAN B. KEESEY, Deceased, Respondent, v. MARION O'REILLY, Appellant.

First Department, February 1, 1918.

**Landlord and tenant — negligence — liability of owner for death of sublessee of furnished rooms killed by falling of chimney while hanging clothes on roof — licensee — evidence insufficient to establish easement over roof as appurtenance to lease.**

In an action by a subtenant of two furnished rooms on the top floor of defendant's building, to recover for the death of his wife who, while upon the roof to hang out some washing was killed by the falling upon her of a part of the chimney, there was no evidence in the lease executed by the defendant, or in any of the subleases, that the roof or any part of the premises was reserved or set aside for use of tenants for drying clothes. It appeared that the only means of access to the roof was by climbing an ordinary fire ladder, pushing off a scuttle and climbing through the opening, and that the roof was of tin without boards or slats for people to walk on, and contained no provisions for fastening clothes lines.

*Held*, on all the evidence, that the deceased was a mere licensee and that a judgment in favor of the plaintiff must be reversed and the complaint dismissed.

The plaintiff, as a subtenant of the rooms, had no easement over the roof as an appurtenance to his lease and the mere fact that his immediate landlord in violation of the principal lease, even with the acquiescence of the owner, permitted housekeeping in the rooms did not create an easement over the roof.

APPEAL by the defendant, Marion O'Reilly, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of January, 1917, upon the verdict of a jury for \$4,500, and also from an order entered in said clerk's office on the 17th day of January, 1917, denying defendant's motion for a new trial made upon the minutes.

*Frederick Mellor*, for the appellant.

*Herbert C. Smyth* of counsel [*Roderic Wellman* with him on the brief; *Joseph Kohler*, attorney], for the respondent.

SHEARN, J.:

In May, 1915, defendant was the owner of a building Nos. 336-338 Lenox avenue and had owned it for about



twelve years. She had bought it as two private houses, and about eight years ago made alterations, throwing the two houses into one, taking off the stoops, placing four stores in the basement and first floor, and making the three floors above suitable for the purpose of renting out furnished rooms. Those three upper floors were rented to one Charles H. Haas by a written lease covering the years 1912 to 1914 and extended by indorsement to cover the year 1915. This lease provided that the three upper floors of the combined buildings were "to be used for sleeping apartments and not for housekeeping in any form whatever." The lessee Haas rented out parts of the leased premises as furnished rooms to various people. Plaintiff, his wife and child occupied two rooms on the top floor, hired by the week. They had lived there a year, when, on May 8, 1915, plaintiff's wife went up on the roof to hang out some washing and was killed by the falling upon her of a part of the chimney. It is claimed by the plaintiff, who has recovered a judgment upon the verdict of a jury, that the plaintiff's wife was upon the roof on the invitation of the defendant, whereas the defendant's contention is that she was there merely as a licensee.

Although the lease prohibited the use of the apartments for housekeeping, such use by plaintiff's family was permitted by Haas. Such use by several other tenants was also permitted by the lessee. Indeed, it was shown that for a considerable period of time the lessee set apart a room on a lower floor for use by the subtenants as a laundry, with hanging lines outside the window. For some three months prior to the accident this room was only partially available because occupied by another subtenant as a kitchen. No measures were actively taken by the owner to compel the lessee to observe the prohibition in the lease against the use of the rooms for housekeeping purposes, and the evidence warranted a finding that the owner tacitly acquiesced in such use as was proved. There is no evidence whatever that in the lease to Haas or in any of the subleases the roof or any other part of the premises was reserved or set aside for the common use of the tenants for drying clothes or that such facilities were in any manner appurtenant to the lease or to the subleases. Late in the course of the trial, on rebuttal,

plaintiff brought out that the defendant's alleged janitor, when asked by plaintiff a week after plaintiff had hired his two rooms, "Where do the people do their washing?" said, "The majority of them do it in their rooms; others washed in the washroom." Plaintiff testified, "I asked him where they hung them; he said, 'You, living on the top floor, it will be closer for you to hang on the roof.'" Assuming that, in the state of the proof, this statement of the janitor was binding upon the defendant, it constituted at most a bare permission to make such a use of the roof. Even if it tended to show an invitation, as distinguished from a mere permission, any such inference was completely overborne by the other evidence in the case.

The only means of access to the roof was by climbing an ordinary iron fire ladder, pushing off a scuttle and climbing through the opening to the roof. There was one such opening in each house. The roof was an ordinary tin roof. No boards or slats were provided for people to walk on. There were no posts on the roof to support lines; there were no pegs, staples or other provision for fastening lines; there was nothing there except the roof itself, skylights, a scuttle and the chimneys, except that, as the evidence warranted the jury in finding, during the period of plaintiff's subtenancy, there was a wire and a hemp rope stretched between the two chimneys, which wire and rope were used by the plaintiff's wife and at times by other subtenants to hang washing upon for the purpose of drying it. No evidence was introduced to show that the defendant or the lessee Haas had anything to do with putting up the wire or the rope, but there was testimony adduced by the defendant, which, if credited, tended to show that the wire had been put up by one of the subtenants and that the rope was put up and taken down from time to time by some one of the subtenants as occasion required. These facts fall far short of warranting a finding that the defendant invited the use of the roof for the purpose of hanging out and drying clothes. A different situation would be presented if it appeared that the defendant had prepared the roof for such use; if, for example, the tin roof, which would readily be made to leak if regularly tramped upon by the numerous subtenants, had been covered with boards

or slats, and if hanging posts or similar facilities intended to carry drying lines had been provided. It would also have been a fact of some significance if the defendant had provided a stairway to the roof and a door opening from the stairway to the roof, instead of an iron ladder and scuttle of the kind ordinarily designed for emergency access to the roof and clearly not suited or intended for women carrying baskets of wet clothes. Assuming that the jury would have been warranted in finding that the defendant knew or ought to have known that some of the subtenants were using the roof for drying clothes, the only legal inference properly to be drawn from these facts, in the light of all of the other facts in the case above referred to, is that the defendant acquiesced in and permitted such use of the roof, thus imposing upon the defendant a duty to exercise only such care as is owing to a bare licensee. The plaintiff as a subtenant by the week of two furnished rooms had no easement over this roof as an appurtenance to his lease, and the mere fact that his immediate landlord, in violation of the principal lease, even with the acquiescence of the owner, permitted housekeeping in these furnished rooms, did not create an easement over the roof. The presence of the plaintiff on the roof was not expected in the enjoyment of any appurtenance shown by the circumstances to be attached to the lease, and was, therefore, not to the mutual interest of the parties. Under the rule stated in *Heskell v. Auburn L., H. & P. Co.* (209 N. Y. 86) and *Vaughan v. Transit Development Co.* (222 id. 79) the circumstances constituted the deceased a mere licensee.

It follows that the judgment and order must be reversed, and, as it appears that a new trial would not change the essential facts upon which this decision is based, the complaint is dismissed, with costs.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concurred.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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First Department, February, 1918.

FRANK M. SIMONS, Respondent, v. EMMA T. TERHUNE, as Executrix, etc., of EDWARD M. GREACEN, Deceased, Appellant.

First Department, February 1, 1918.

**Husband and wife — when estate of deceased husband not liable to brother-in-law of wife for her support during lifetime of husband and while living separate and apart from him — evidence.**

In an action by the brother-in-law of the wife of a deceased husband to recover from his estate for board, lodging and wearing apparel which plaintiff furnished to his sister-in-law during the lifetime of the husband, it appeared that the sister-in-law after a separation from her husband lived with her mother for about twenty years and then went to live in the home of the plaintiff and remained there until the death of her husband; that during this period the husband resided within the same county to the knowledge of both the plaintiff and the wife; that no action was ever brought by her for separation or for support; that no demand was ever made either by her or by the plaintiff against the husband during his lifetime; that the husband had furnished the wife some money and had also cared for the daughter and that no attempt was made to prove any express agreement between the wife, as agent of her husband, and the plaintiff to pay for board, lodging and clothes. The court charged that if the jury believed that the plaintiff harbored his sister-in-law freely and gratuitously and without thought of looking to the husband for compensation therefor, he cannot recover.

*Held*, that a verdict in favor of the plaintiff is contrary to the law as charged, and against the evidence, and that the judgment thereon must be reversed and the complaint dismissed.

SCOTT, J., dissented.

APPEAL by the defendant, Emma T. Terhune, as executrix, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of April, 1917, upon the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of April, 1917, denying defendant's motion for a new trial made upon the minutes.

*Joab H. Banton* of counsel [*Dwight W. De Motte*, attorney], for the appellant.

*Jacob M. Kram*, for the respondent.

SHEARN, J.:

The plaintiff, a brother-in-law of Martha Greacen, has recovered a judgment against the defendant, as executrix

under the will of Edward M. Greacen, the deceased husband of Martha Greacen, for board, lodging and wearing apparel which the plaintiff furnished to his sister-in-law during the lifetime of decedent. Martha Greacen married the decedent in the city of New York on March 9, 1889. A daughter was born to them on January 17, 1890. Within a few months thereafter Mr. and Mrs. Greacen separated. For twenty-one years thereafter Mrs. Greacen lived with her mother, whose residence was throughout said period within the county of New York. In February, 1911, Mrs. Greacen went to live in the home of her brother-in-law, the plaintiff, and continued to live in his home until the death of her husband on October 15, 1916. During this period the residence of the plaintiff was in or about New York city. Edward M. Greacen resided within the county of New York during the entire twenty-six years from the separation to his death, and this fact was known and his whereabouts were known both to the plaintiff and the wife. No action was ever brought by Mrs. Greacen against her husband for separation or for support and no complaint was ever lodged against him in a magistrate's or other court, nor was any other effort made to compel the decedent to support his wife. No demand for support was ever made either by Mrs. Greacen or by the plaintiff, and plaintiff never sent any bill and never wrote any letter to the decedent asking payment of any money. When the daughter was about twelve years old she went to live with her father. She lived with him about six months and good relations existed between them thereafter, and it appears that the father bought her clothing, sent her to a private school, had a private teacher instruct her in stenography, put some money in a savings bank for her and made her various presents from time to time. It also appears that as late as 1913 Mrs. Greacen and her husband were on friendly terms, evidenced by numerous letters in evidence written by Mrs. Greacen to her husband during the period between 1911 and 1913, acknowledging checks received from him. These sums of money, however, were evidently very small, for the wife testified that the total sum contributed by the deceased toward her support and maintenance during the entire period of the separation was not to exceed \$100. After the death

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of Mr. Greacen this action was begun, based upon the theory that the wife had pledged her husband's credit for the payment to her brother-in-law of the reasonable value of the board, lodging and clothing furnished by the brother-in-law in reliance thereon. As a first step it became necessary to claim and establish that the wife was justified in living separate and apart from her husband, and evidence was introduced tending to show that she had left her husband because of his cruel and inhuman treatment. The husband being dead, there was no serious difficulty in establishing this claim, based upon occurrences dating back some twenty-seven years. No attempt was made to prove any express agreement made between the wife, as agent of her husband, and the plaintiff, her brother-in-law, to pay for board, lodging and clothing, but, having established the legal obligation of the husband to support the wife, the plaintiff rested upon an implied promise. Considering the relationship of the plaintiff and his sister-in-law, a serious question might be raised whether the law would imply an agreement on her part, either individually or as agent for her husband, to pay for the board, lodging and wearing apparel furnished by the brother-in-law, in whose home the wife lived. (*Wilcox v. Wilcox*, 48 Barb. 327, 329; *Williams v. Hutchinson*, 3 N. Y. 312, 317; *Van Kuren v. Saxton*, 3 Hun, 547; *Matter of Perry*, 5 Misc. Rep. 149; 9 Cyc. 273.) The question, however, is not presented on this appeal, for the case went to the jury with the consent of both parties under the charge that "If the jury believes that Mr. Simons harbored his sister-in-law freely and gratuitously and without thought of looking to Mr. Greacen for compensation therefor, \* \* \* he cannot recover in this action." The question, then, is whether the verdict is not contrary to law and against the evidence. In our opinion it is overwhelmingly so. Aside from the relationship of the plaintiff and his sister-in-law, the fact that the matter of payment for board, lodging and wearing apparel was never alluded to between the plaintiff and his sister-in-law; that the wife had never made any demand upon her husband for support; that the plaintiff, although he knew the whereabouts of the husband and knew that he had a bank account, never made any suggestion or request that the husband should

contribute toward the support of the wife; that the plaintiff never sent a bill to the husband, and that there is not an item of evidence tending to show that the plaintiff expected to be paid, combine to overthrow completely any *prima facie* presumption of an implied promise, if such a presumption may be indulged in. On the ground, therefore, that the verdict was contrary to the law as charged and against the evidence, the judgment and order must be reversed and, as it does not appear that the essential facts would be changed upon a new trial, the complaint is dismissed, with costs.

CLARKE, P. J., LAUGHLIN and PAGE, JJ., concurred; SCOTT, J., dissented.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of HYMAN SOLOMON, Respondent, for Compensation under the Workmen's Compensation Law, v. SAMUEL BONIS, Employer, and the GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, Insurance Carrier, Appellants.

Third Department, November 28, 1917.

**Workmen's Compensation Law — plasterer injured while repairing plaster in apartment house for owner and operator thereof, not entitled to an award.**

A plasterer employed by the hour by the owner and operator of an apartment house to repair the plaster, who was injured while so engaged on October 8, 1916, is not entitled to an award under the Workmen's Compensation Law, as it existed on the date of the injury.

LYON and WOODWARD, JJ., dissented, with opinion.

APPEAL by the defendants, Samuel Bonis and another, from an award of the State Industrial Commission, filed in the office of said Commission on the 19th day of January, 1917, and also from an award entered in the office of said Commission on the 11th day of April, 1917.

*Alfred W. Meldon* [*Lindsay D. Holmes* of counsel], for the appellants.

*Merton E. Lewis*, Attorney-General, and *Robert W. Bonynges*, for the respondent Commission.

*David Harrison*, for the claimant, respondent.

JOHN M. KELLOGG, P. J.:

The findings show that the employer was the owner and operator of an apartment house. "There was some plastering to be done in one of the bathrooms in said apartment house, and Bonis [the employer] sent for Solomon to come and do the plastering at 75 cents per hour, and directed him to purchase whatever materials were needed and to pay for the same, and agreed to reimburse him for such outlay. The total payment made by Bonis to Solomon in respect of this work was \$3. It was customary for Bonis to send for Solomon whenever he had any plastering work to be done, and to pay Solomon on the above-mentioned basis." While plastering, Solomon fell and received the injury for which compensation has been made. *Matter of Bargey v. Massaro Macaroni Co.* (170 App. Div. 103; 218 N. Y. 410), seems to settle this question in favor of the appellants. It is true that the *Bargey* case was commented upon and distinguished in *Matter of Mulford v. Pettit & Sons* (220 N. Y. 540). In that case it was only decided that a salesman, in a non-hazardous employment, who uses a motorcycle in making his trips, and is killed thereby, is operating a vehicle within group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). The *Mulford* case in no way limits or qualifies the *Bargey* case. This is made plain by *Matter of Schmidt v. Berger* (221 N. Y. 26), in which the *Bargey* case is cited with approval, and which holds that the superintendent of an apartment house, who made ordinary repairs upon it, while mounted on a stepladder engaged in cutting away a part of a door to prevent "binding," was not in a hazardous employment. That case has much force here, as managing an apartment house was not, at the time of the



accident, a hazardous employment. (See, also, *Matter of Kammer v. Hawk*, 221 N. Y. 378.)

After the decision of the *Bargey* case subdivision 5 of section 3 of the Workmen's Compensation Law, defining "employment," was amended. (Laws of 1916, chap. 622.) When the *Bargey* case arose subdivision 5 of section 3 defined "employment" as including "employment only in a trade, business or occupation carried on by the employer for pecuniary gain." The amendment of 1917 (Laws of 1917, chap. 705) added after the word "gain," "or in connection therewith." The effect of that amendment is not before us; it may be that it qualifies the *Bargey* case, so that under the facts in that case, the employer being engaged in a hazardous business, carpenters at work in the factory would be deemed within the protection of the Workmen's Compensation Law. That, however, we need not consider. Aside from the effect of that amendment, and the amendment of subdivision 4 of the section, the *Bargey* case is in full force, and that and the *Schmidt* case are decisive here.

The award should, therefore, be reversed and the claim dismissed.

All concurred, except LYON, J., dissenting, with opinion, in which WOODWARD, J., concurred.

LYON, J. (dissenting):

The question presented by this appeal is whether a person injured October 8, 1916, while engaged in a hazardous employment incidental to a non-hazardous business carried on by his employer for pecuniary gain, is covered by the Workmen's Compensation Law, as amended by chapter 622 of the Laws of 1916. The claimant was a plasterer and was engaged in the hazardous occupation of repairing the plaster in one of the bath rooms of the employer's apartment house. These repairs were incidental, and in fact indispensable to conducting the non-hazardous business of operating an apartment house. The case thus falls within the decision of *Matter of Mulford v. Pettit & Sons* (220 N. Y. 540). The cases of *Matter of Bargey v. Massaro Macaroni Co.* (218 N. Y. 410; *Matter of Schmidt v. Berger* (221 id. 26) and *Matter of Kammer v.*

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*Hawk* (Id. 378) related to accidents occurring prior to June 1, 1916, the date when the above-mentioned amendment took effect. A partial effect of such amendment is pointed out in the recent case of *Matter of Dose v. Moehle Lithographic Co.* (221 N. Y. 401). (See, also, concurring memorandum per POUND, J., in *Matter of Glatzl v. Stumpp*, 220 N. Y. 71, 76.)

The award should be affirmed.

WOODWARD, J., concurred.

Award reversed and claim dismissed.

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WILLIAM E. CONLEY, Appellant, v. MAX FINE, Respondent.

First Department, February 15, 1918.

**Real property — assignment of rents as collateral security — prior mortgage of same property and subsequent assignment of rents arising therefrom to assignee of mortgage as collateral security — priority of claim to rents — assignment of rents not a conveyance or incumbrance within the meaning of the Recording Act.**

Where an owner of property, after executing and delivering a bond and mortgage thereon, assigned to the plaintiff the rents accruing from the same property as security for an indebtedness, and expressly authorized him to collect such rents as have accrued until the satisfaction of his debt, and the mortgagee on the date of the mortgage assigned the same to the defendant, and after the assignment of rents to the plaintiff the owner also executed and delivered to the defendant an assignment of the rents and profits arising from said property as security for the sum secured by the bond and mortgage, the plaintiff is entitled to priority of payment out of the rents.

An owner of real property may lawfully assign the rents to accrue and grant the reversion to another.

The fact that the assignment of the rents to the plaintiff was not recorded until after the mortgage and the assignment of the rents to the defendant were made is immaterial, because the assignment of rents was not a conveyance nor an incumbrance upon real property, and was, therefore, not within the Recording Act.

The defendant was not entitled to the rents because he held a mortgage upon the property, nor because of a provision in the mortgage entitling him to the rents in case of default, there being no evidence that any

such default had occurred when the rents sought to be recovered were collected. Nor does the fact that the defendant was in possession solely by permission of the mortgagor when he collected the rents give him a right thereto.

\*DAVIS, J., dissented, with opinion.

APPEAL by the plaintiff, William E. Conley, from a determination and order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 28th day of September, 1917, reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Seventh District, in plaintiff's favor and awarding judgment to the defendant.

*Warren A. Schenck* of counsel [*Ingram, Clark, Taylor & Schenck*, attorneys], for the appellant.

*Jacob R. Schiff* of counsel [*Morrison & Schiff*, attorneys], for the respondent.

SCOTT, J.:

The facts in this case lie within a narrow compass and are not in dispute. On September 27, 1916, the Ronele Construction Company, being the owner of certain improved property in the city of New York, and being indebted to plaintiff in the sum of \$1,000, assigned to him the rents accruing from said real property as security for such indebtedness and expressly authorized him to collect such rents as they accrued until he should have collected the full amount of the indebtedness due to him. This assignment was in writing, and was couched in very full and formal language.

On October 14, 1916, the said Ronele Construction Company executed and delivered to one Robert Slater a bond and mortgage to secure the sum of \$6,000, the mortgage covering the same property of which the rents had been assigned to plaintiff. On the same day Slater assigned the bond and mortgage to defendant. On October 16, 1916, the Ronele Construction Company also executed and delivered to defendant an assignment of the rents and profits arising from said real property as security for the sum of \$6,000 secured to be paid by the aforesaid bond and mortgage. It is alleged in the answer and is not denied that on or about

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October 15, 1916, the defendant, with consent of the owner of the equity of redemption, went into possession of the premises and has ever since remained in possession and has collected the rents, issues and profits thereof.

In October, 1916, plaintiff was repaid on account of the amount due him the sum of \$500, with interest, leaving still due \$500. Since that he has collected only \$79, the defendant having collected all the rest of the accruing rent, amounting to over \$750. Plaintiff now claims that he is and was entitled to priority of payment out of the rents, and the defendant having refused to pay him, he brings this action.

The Municipal Court awarded judgment to plaintiff for the amount claimed. The Appellate Term reversed this judgment and rendered judgment in favor of defendant for the seventy-nine dollars which plaintiff collected after defendant had gone into possession of the property. (100 Misc. Rep. 713.)

There can be no doubt that the owner of real property can lawfully assign the rents to accrue, although he may grant the reversion to another. In *Swan v. Inderlied* (187 N. Y. 372, 374) the Court of Appeals said of a general lessee who had subleased, thus being in the same position of an owner who had made a lease: "It is conceded that it was within the power of the lessor to separate the rent that was to accrue under the lease from his reversion in the premises and assign such rent to Worden," and in *Harris v. Taylor* (35 App. Div. 462, 467) this court said: "He [the mortgagor] could at any time before he was divested of his title dispose of these rents as he pleased." The leading case upon the subject in this State is *Demarest v. Willard* (8 Cow. 206), in which the court said: "When rent is reserved, it is incident, though not inseparably so, to the reversion. \* \* \* The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent, by special words. \* \* \* It was perfectly within the power of the plaintiff to have assigned the rent to one, and the reversion to another."

It was competent, therefore, for the Ronele Construction Company to assign the rents to accrue to the plaintiff as it did, and since neither the execution nor the consideration of that assignment is called in question, it is clear that it

was valid, binding and effective. Having thus validly and effectively assigned the rents to plaintiff to the extent indicated in the assignment itself it could not lawfully assign those rents to another, and while it might assign the rents to become due after plaintiff's debt had been paid, it could do no more. The assignment of the rents to defendant, therefore, although absolute in form, could convey no right to the rents that had already been assigned to plaintiff, and could become effective only after plaintiff's claim had been satisfied. The rents for which plaintiff was awarded judgment in the Municipal Court were, therefore, rents which belonged to him and which defendant had no right to collect, and which, having collected, he should be required to pay to plaintiff. It is axiomatic that the assignee of a non-negotiable chose in action can obtain no greater right than his assignor had, and it is perfectly clear that the Ronele Construction Company, defendant's assignor, could not lawfully have collected and retained the rents until plaintiff's assignment had been satisfied.

The circumstance that the assignment of the rents to plaintiff was not recorded until after the mortgage to Slater and the assignment of the rents to defendant were made, is of no consequence because an assignment of rents was not a conveyance of, nor an incumbrance upon real property and was, therefore, not within the Recording Act. (*Harris v. Taylor, supra.*) If defendant's claim to retain the rents in question rests solely upon the assignment to him, as we think it must, it is clearly defective.

Nor does the fact that defendant, when he collected the rent, held a mortgage upon the property, strengthen his claim. It is true that the mortgage contains a clause which reads as follows: "5. That if default shall be made in the payment of the principal sum mentioned in the said bond, or any installment thereof, or of the interest which shall accrue thereon, or of any part of either at the respective times therein specified for the payment thereof, the said mortgagee shall have the right forthwith after any such default, to enter upon and take possession of the said mortgaged premises and to let the said premises and to receive the rents, issues and profits thereof, and to apply the same, after payment

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of all necessary charges and expenses on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee." But the right to take the rents under this claim is predicated upon a default in the payment of the principal or of any installment thereof, and there is no evidence that any such default had occurred when the rents sought to be recovered were collected. The defendant can take nothing, therefore, under this clause. Nor can he take anything under the bare fact that he held a mortgage upon the property. That gave him no title to the property and no right to receive the rents thereof. Until foreclosure he held nothing more than a lien upon the property, with no legal estate in it. (*Barson v. Mulligan*, 191 N. Y. 306; *Harris v. Taylor*, *supra*.)

Finally, it is sought to uphold the determination appealed from because the defendant when he collected the rents which plaintiff seeks to recover was a mortgagee in possession. If he became such it was solely by permission of the mortgagor, for the mortgage gave him no right to possession before foreclosure. (*Barson v. Mulligan*, *supra*.) As already indicated, the mortgagor, having already assigned the rents up to \$1,000 to plaintiff, could not confer upon defendant, by giving him possession of the property or otherwise, the right to collect and retain that which had already been validly assigned to plaintiff. It appears to be assumed by defendant that in consequence of having become a mortgagee in possession, he was placed in the same position that would have been held by a receiver of the rents and profits appointed as an incident of an action to foreclose the mortgage. The analogy is not so obvious as it might be, but if it were the defendant's position would not be upheld. Precisely that case was presented in *Harris v. Taylor*, already referred to. The owner of the property in that case had assigned the rents to one Lesster as collateral security for a mortgage. He had then executed a second mortgage to the plaintiff Harris. An action was begun to foreclose this second mortgage, and a receiver of the rents was appointed on motion of the second mortgagee. The question presented was as to Lesster's preferential right to receive the rents for the satisfaction of his assignment. This court, speaking through

Mr. Justice O'BRIEN, said: "We think that Lesster's right to the rents is plainly superior to the plaintiff's. It is immaterial whether or not the plaintiff's mortgage was executed prior to Lesster's assignment. Even if that were so, it did not give the plaintiff a lien upon the rents. She obtained no right thereto until the appointment of the receiver (*Ranney v. Peyser*, 83 N. Y. 1) and this was long after the execution of the assignment."

In the same case Mr. Justice BARRETT said: "Neither the plaintiff nor Lesster acquired any right to the rents under their mortgages. The rents belonged to the mortgagor as incident to his ownership of the land. They were in fact personalty. He could at any time before he was divested of his title dispose of these rents as he pleased. And he did so dispose of them to Lesster by the assignment in question. It was under this assignment, and not under his mortgage, treated independently, that Lesster became entitled to these rents. \* \* \*

"It is true that in such an action [foreclosure] the rents can be incidentally sequestered for the plaintiff's benefit upon proof of the inadequacy of the security. Primarily they can only be so sequestered, however, as against the mortgagor. To sequester them as against the mortgagor's assignee thereof, the plaintiff would have to show something more than inadequacy. He would have upon proper allegations and proofs to overturn the assignment."

That case is precisely applicable to the facts in the present case, and is decisive of it.

The determination of the Appellate Term is reversed, and the judgment of the Municipal Court affirmed, with costs to the appellant in this court and the Appellate Term.

LAUGHLIN, DOWLING and SMITH, JJ., concurred; DAVIS, J., dissented.

DAVIS, J. (dissenting):

In this case the bond for \$6,000, secured by the mortgage, was payable on demand. It was, therefore, past due, and the mortgagor was in default. The default was recognized by the mortgagor when it allowed the assignee of the mortgage to go into possession.

By the terms of the mortgage the rents were assigned to the mortgagee upon default. Neither the mortgagee nor the assignee of the mortgage had any notice of the prior assignment of rents to the plaintiff until defendant had been in possession under the mortgage about three months. During that period the plaintiff had collected no rents under his assignment, doubtless because the assignment was made as collateral security for the payment of a note and there had been no default in its payment. To reverse the determination of the learned Appellate Term would be to hold that a secret agreement between the mortgagor and an assignee of rents as collateral security takes priority over a subsequent mortgage past due and under which the mortgagee is in possession and by the terms of which the mortgagee is entitled to receive the rents.

Such a result would deprive mortgagees without notice of prior and secret assignments of rents of an important part of their security.

The determination of the Appellate Term should be affirmed.

Determination of Appellate Term reversed and judgment of Municipal Court affirmed, with costs to appellant in this court and the Appellate Term.

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WILLIAMSBURG CITY FIRE INSURANCE COMPANY, Respondent,  
v. DORA LICHTENSTEIN, Individually and as Administratrix,  
etc., of JOSEPH LICHTENSTEIN, Deceased, and Others,  
Appellants, Impleaded with LILLIAN GREEN, Formerly  
LILLIAN LICHTENSTEIN, and Others, Defendants.

First Department, February 15, 1918.

**Statute of Frauds** — parol agreement extending time of payment of mortgage not to be performed within one year — part performance — payment of consideration — when Statute of Frauds need not be pleaded as a defense — evidence — cumulative evidence.

A parol agreement to extend the time of payment of a mortgage not to be performed within a year is invalid under the Statute of Frauds.

Where the invalidity of a contract under the Statute of Frauds is apparent upon the face of the pleading or is such as pleaded that the proof may



show it to be obnoxious to the statute, the objection to be availed of must be taken by answer, reply or demurrer.

But where an agreement as pleaded in an answer does not contravene the Statute of Frauds, but the proof which does not follow the pleading discloses that said agreement is obnoxious to the statute, the void agreement will not be enforced, notwithstanding the failure to plead the statute.

Where in a suit to foreclose a mortgage the sole defense relied upon is an alleged parol extension agreement, and the only one of the defendants who had personal knowledge thereof testified fully and repeatedly that he had nothing to add to or alter in his evidence, and it is not suggested that the defendants had any witnesses to prove a different agreement, it was not error for the court to direct judgment for the plaintiff without permitting other witnesses to be called by the defendant to prove the same agreement, as such evidence would have been merely cumulative.

Where a mortgagor agrees by parol to extend the time of payment of the mortgage upon receipt of eight semi-annual installments of \$500 each, the payment of said installments does not constitute a part performance so as to render the contract valid under the Statute of Frauds.

The exception made by section 31 of the Personal Property Law, where the contract is for the purchase of personal property exceeding fifty dollars in value, does not apply to the above agreement.

Payment even to the whole amount of the purchase money is not deemed such a part performance as to justify a court of equity in enforcing a contract void under the Statute of Frauds.

APPEAL by the defendants, Dora Lichtenstein, individually and as administratrix, and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of October, 1917, directing the foreclosure of a mortgage and a sale of the mortgaged premises upon the decision of the court after a trial at the New York Special Term.

*Max Schleimer*, for the appellants.

*H. Randolph Anderson* of counsel [*Augustus S. Hutchins* with him on the brief; *A. S. & W. Hutchins*, attorneys], for the respondent.

SCOTT, J.:

This is an appeal from a judgment of foreclosure and sale. The sole defense relied upon by the appellants, the present owners of the mortgaged property, is that the debt secured is not yet due because, as is alleged, the time for payment has been extended by agreement, and the principal

question involved is whether or not this defense has been established. The mortgage was given in 1909 by Joseph Lichtenstein and his wife to secure the payment of the sum of \$45,000 to become due and payable on February 16, 1914.

Joseph Lichtenstein died on March 2, 1912, intestate, and leaving him surviving his widow and seven children, all of whom are appellants here. The defense to which allusion has been made is based upon a conversation, on or about February 6, 1914, between one of the officers of plaintiff and the defendant Isidore Lichtenstein, one of the heirs at law of the deceased mortgagor, and who appears to have acted in behalf of himself, his coheirs and his mother. None of these were personally liable for the debt.

The agreement between the plaintiff and Isidore Lichtenstein was pleaded in the original answer as follows: "Thereafter such negotiations were had between the plaintiff, its officers and agents and the said defendant Isidore Lichtenstein that resulted into the making of an agreement between the plaintiff and the said Isidore Lichtenstein, acting on his own behalf and on behalf of the said defendants, Dora Lichtenstein, Perry M. Lichtenstein, Edna Blumberg and Lillian Green, whereby it was agreed between them that in consideration of the said defendants assuming the payment of the said sum of \$4,000 to be paid to the plaintiff in installments of \$500 semi-annually at the time of the payment of the interest on the said mortgage, the plaintiff would upon such payment extend the time of payment of the balance on said mortgage the sum of \$41,000 to February 16, 1921." To this defense, which was also pleaded as a counterclaim for the specific performance of the agreement to extend the time of payment, the plaintiff pleaded the Statute of Frauds in that the agreement alleged was not in writing and was not to be performed within a year. To this reply the defendants demurred, and upon the hearing of the demurrer it was overruled (98 Misc. Rep. 342), and the order overruling it was affirmed here (176 App. Div. 910).

The appellants thereupon amended by alleging that the agreement of February 6, 1914, was an executed and completed agreement whereby plaintiff agreed that it would then presently reduce the principal of the mortgage debt and

extend the time for its payment, upon the promise of said Isidore Lichtenstein that he, or the defendants whom he represented, would assume the payment of \$4,000 of said debt, and would pay the same in semi-annual payments of \$500 each. The agreement thus pleaded not being obnoxious to the Statute of Frauds, the plaintiff did not reply thereto but went to trial upon the complaint and amended answer. Isidore Lichtenstein was called as a witness for the defendants and interrogated as to the agreement he had made with the plaintiff. He testified that the agreement was as it had been pleaded in the original answer, that is, that if he and those for whom he spoke would pay the interest and pay off the principal to the extent of \$4,000 in semi-annual installments of \$500 each, the plaintiff would then execute an extension of the mortgage for three years. This agreement was open to the same objection which had been sustained to the agreement pleaded by the original answer, that it was an oral agreement not to be performed within a year. The court thereupon rendered judgment for the plaintiff.

It is not contended by the respondent that the time for the payment of a debt, even when evidenced by a bond under seal, may not be extended by parol. The contention is that the alleged agreement to extend was not valid, because it was not only oral, but by its terms, as testified to, was not to be performed within a year. That this was the character of the agreement was made clear by the testimony of the witness Lichtenstein, who was the person, and the only person, who represented the appellants in the transaction. His testimony on that subject was as follows: "I told Mr. Burdess that I came and wanted to know what the board of directors of the company had decided to do about the mortgage. He told me that if I would pay him the \$500 every six months, they would allow me to reduce the mortgage to \$41,000 by paying the \$500 every six months on the interest date, and then after the \$4,000 was paid, he would give me a written extension of the mortgage for three years. \* \* \*

Q. What else took place after that? A. Then I asked him whether he would not give me this agreement in writing. He said 'you will have to take our word for that. You make your payments regularly on the \$500, and after you pay off

the \$4,000 in the installments, we will give you a regular form of extension for three years.' By the Court: Q. When was that extension to run from — at the expiration of the last payment? A. Yes, after the last payment on the \$4,000. Q. That was your understanding? A. That was my understanding. By Mr. Schleimer: \* \* \* Q. What was your understanding as to their right to foreclose? A. The mortgage was an oral extension, from what I understood, and as soon as I paid off the \$4,000 in installments of \$500, I was to get the writing to that effect, that it was extended for three years, and was reduced to \$41,000. It was to be a standing mortgage for three years. By the Court: Q. Repeat that again. A. After I paid off the \$4,000 in installments — Q. That would take four years? A. Yes. Q. That would bring you up to 1918? A. Yes. I was then to get a written extension for three years of a standing mortgage of \$41,000. \* \* \*

Clearly this agreement to extend, which is the agreement upon which appellants rely, was not to be performed within a year — it was to be performed after four years, that is, when \$4,000 had been paid in eight semi-annual installments. It differed radically from the agreement pleaded in the amended answer.

It is objected that plaintiff may not avail itself of the Statute of Frauds because it did not plead the statute. It is undoubtedly true that where the invalidity of a contract under the Statute of Frauds is apparent upon the face of the pleading, or is such, as pleaded, that the proof may show it to be obnoxious to the statute, the objection that it contravenes the statute, to be availed of, must be taken by answer, reply or demurrer. (*Crane v. Powell*, 139 N. Y. 379; *Honsinger v. Mulford*, 90 Hun, 589; *affd.*, 157 N. Y. 674.) But in the present case the extension agreement as pleaded in the amended answer did not contravene the statute, and if the proof had followed the pleading, it would have disclosed a contract valid so far as the Statute of Frauds was concerned. But the proof did not follow the pleading, but, on the contrary, disclosed that the agreement relied upon was obnoxious to the statute. Under such circumstances the void contract will not be enforced, notwithstanding the failure

to plead the statute. To permit a recovery under such circumstances would be to permit a recovery upon a different agreement from that pleaded. (*Fanger v. Caspary*, 87 App. Div. 417; *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339.)

It is further objected that the court directed judgment for the plaintiff without waiting for defendants to close their case. On its face this appears to be a formidable objection, but is not such in reality. The sole defense upon which appellants relied was the alleged extension agreement. As to that the defendant Isidore Lichtenstein, the only one of the appellants who had personal knowledge, testified fully and repeatedly that he had nothing to add to, or alter in his evidence. That evidence showed that the agreement was unenforceable. It is not suggested and indeed is not possible that appellants had any witnesses to prove a different agreement, and to have permitted witnesses to be called to prove the same agreement that the principal witness had already testified to would simply have amounted to receiving cumulative evidence.

Finally, it is contended that although the extension agreement as proven may have been invalid under the Statute of Frauds because not to be fulfilled within a year, it became validated by part performance on the part of appellants, such part performance consisting of the payment by appellants of the interest on the mortgage as it accrued, and four installments of \$500 each on account of the principal. These payments were made between February 13, 1914, and March 31, 1916.

It is well settled that part performance by one party to a contract not to be performed within a year, as by paying part of the consideration, will not relieve the contract from the ban of the Statute of Frauds. The exception made by statute where the contract is for the purchase of personal property exceeding fifty dollars in value (Pers. Prop. Law, § 31)\* does not apply to the contract in question. As to all other contracts within the purview of the statute part performance is not sufficient. "By an unbroken current of

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\*See, also, Pers. Prop. Law (Consol. Laws, chap. 41; Laws of 1909. chap. 45), § 85, as added by Laws of 1911, chap. 571.—[RE.]

authorities running through many years, it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract." (Brown Stat. Frauds, § 461.) This rule is the settled law of this State. (See *Cooley v. Lobdell*, 153 N. Y. 596; *Milholland v. Payne*, 169 App. Div. 712; *affd.*, 218 N. Y. 675; *Wheeler v. Reynolds*, 66 id. 227; *Russell v. Briggs*, 165 id. 500.)

It appears from the judgment that the amount paid by the appellants has been credited upon the amount found to be due upon the mortgage, thus relieving their property to that extent. It may be that if they had counterclaimed for it they could have compelled a repayment to them of this sum (See *Cooley v. Lobdell*, *supra*) and thus have been restored to the same position they were in when the alleged agreement was made. But no such claim is embraced in the amended answer, and it is, therefore, needless to pursue that subject.

The judgment appealed from is affirmed, with costs.

LAUGHLIN, DOWLING, SMITH and DAVIS, JJ., concurred.

Judgment affirmed, with costs.

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HOLMES ELECTRIC PROTECTIVE COMPANY, Appellant, v.  
WILLIAM WILLIAMS, as Commissioner of Water Supply,  
Gas and Electricity, and Others, Respondents.

First Department, January 18, 1918.

**Corporations — validity of incorporation as telegraph company cannot be collaterally attacked — validity of incorporation must be determined in suit to which People of State is party — municipal corporations — secondary franchise to use public streets for electric wires must be obtained from municipal authorities — when no estoppel by permission of such use without secondary franchise.**

A corporation which received its certificate from the State in 1883 and was organized under the provisions of the acts of 1848 and 1853 as a telegraph company, thereby became incorporated as a telegraph company, and the

question as to whether its incorporation was invalid in that, instead of conducting a telegraph business strictly speaking, it engaged in the business of furnishing protection against burglary by a system of electric alarm, etc., cannot be raised collaterally by the city of New York in an action brought by such corporation to enjoin the city from interfering with the plaintiff in the operation of its alleged franchise rights in said municipality. The validity of the incorporation can only be raised by the People of the State of New York, without whose presence before the court no adjudication on such issue can be made.

*It seems*, that an action to test the validity of such incorporation must be brought by the People of the State by whom the franchise was granted if, in the judgment of the proper State officials, any cause for such action exists.

Assuming, however, that the plaintiff was lawfully incorporated as a telegraph company under the acts aforesaid it did not thereby acquire any special franchise to operate its wires over or under the streets of the city of New York without the permission of the proper municipal authorities and, in addition to the franchise acquired from the State, it was also required to obtain from the city the special, or so-called secondary, franchise to use the city's streets for the maintenance of its wires and fixtures.

Moreover, the fact that the plaintiff for many years had been allowed to maintain its wires over private buildings and was subsequently required by the city of New York to place its wires in subways thereafter constructed, did not operate to estop the city from asserting that the plaintiff has no right to use the city streets except as authorized by a municipal or secondary franchise to do so, obtained from the proper municipal authorities.

It follows from the considerations aforesaid that the plaintiff's suit to enjoin the city from interfering with the operation of its lines was properly dismissed.

APPEAL by the plaintiff, Holmes Electric Protective Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on or about the 22d day of December, 1916, dismissing the complaint upon the decision of the court after a trial at the New York Special Term.

*Alfred B. Cruikshank* of counsel [*Charles T. Russell* with him on the brief], *Atwater & Cruikshank*, attorneys, for the appellant.

*Frank Julian Price* of counsel [*Samuel J. Rosensohn* with him on the brief], *Lamar Hardy, Corporation Counsel*, attorney, for the respondents The City of New York and others.

*George L. Ingraham* of counsel for The American District Telegraph Company, intervening.

DOWLING, J.:

This is an appeal from a judgment dismissing the complaint in an action brought to secure, among other things, an injunction restraining the defendants from interfering with the plaintiff in the operation of its alleged franchise rights, and also restraining the city of New York and its official representatives from demanding or collecting any sums of money from plaintiff as a condition of granting a further or additional franchise, or for the operation of its present alleged franchises, or for permission to extend its present lines. It was also sought to enjoin the Empire City Subway Company, Ltd., from refusing plaintiff space in and access to its subways for the operation of its business, and to enjoin the defendant Williams and his successors from interfering with the plaintiff's business, and to obtain a mandatory injunction requiring him to issue to plaintiff such permits as might be necessary in the conduct of its business and the use of the city streets. Judgment was also prayed that plaintiff at the time of its incorporation in 1883 had, and ever since has had, and now has, a good and valid franchise and vested right to erect, construct and operate electric telegraph lines, wires and conductors in, over and upon and under the streets and highways of the city of New York. There is practically no dispute as to the facts in the case.

In 1872 Edwin Holmes instituted the central office system of burglar alarms, which involved the connecting of the premises to be protected with a central station by means of low tension electric wires which, in case of unauthorized or accidental interference, automatically registered an alarm at the central office. Incidentally thereto watchmen were employed to patrol and inspect the protected premises and the apparatus connected therewith. In 1874 Holmes caused to be incorporated the Holmes Burglar Alarm Telegraph Company under the provisions of the General Manufacturing Act of 1848 (Laws of 1848, chap. 40), to which he transferred his then existing business, which did not include any receipt of messages or communications between individuals nor their transmission from place to place.



The American District Telegraph Company had been incorporated under the Telegraph Companies Act of 1848 (Laws of 1848, chap. 265), and its business did not include receiving messages or communications from individuals and their transmission by the electrical telegraph from one place to another. On January 29, 1883, the plaintiff was organized under the laws of the State of New York pursuant to the provisions of chapter 265 of the Laws of 1848, entitled "An Act to provide for the incorporation and regulation of telegraph companies." The purposes for which it was organized, as set forth in the articles of incorporation, were the doing of a general telegraph and electric protection business, and to own, construct, use and maintain a line or lines of electric telegraph partly within and partly without the limits of the State of New York, and for the purpose of owning interests in such line or lines of electric telegraph and any grants thereof. The general route of the telegraph and protective line, as set forth in said articles, was from the main office near the Stock Exchange to points in the city of New York where branch offices might be established, and from such offices along, across and under streets and avenues and over buildings in said city and into buildings so as to connect such buildings with the offices of the association, and to connect all such offices with each other; also to connect the main office with another main office in Jersey City and with other cities and towns in the States of New York and New Jersey or other points in the United States, so as to connect buildings with the offices of the association in each of said cities or towns, for the purpose of protecting said buildings together with their contents against burglary and fire, and for doing a general telegraphic business.

Chapter 265 of the Laws of 1848 provided certain requirements for the articles of association of those who sought to be incorporated thereunder, including the general route of the line of telegraph, designating the points to be connected, and provided (§ 5) that corporations organized thereunder were authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of the State, by the erection of the necessary fixtures, including posts, piers or

abutments, provided the same should not incommode the public use of the roads or highways or injuriously interrupt the navigation of said waters. Chapter 471 of the Laws of 1853 amended the act of 1848, but provided (§ 2) that a corporation organized thereunder was authorized to erect and construct from time to time the necessary fixtures for its lines of telegraph over, upon or under any of the public roads, streets and highways, and through, across or under any of the waters within the limits of this State, subject to the restrictions in the act of 1848 contained; and also to erect and construct such fixtures upon, through or over any other land, subject to the right of the owner thereof to full compensation for the same.

Upon its incorporation, plaintiff, pursuant to an agreement made some four days before between the Holmes Burglar Alarm Telegraph Company and the American District Telegraph Company, took over the central office system of electrical burglar alarm protection and the private patrol and night watch signal business of both companies, with their patents, good will and plant, and thereafter conducted both businesses in its own name and as one enterprise. Before the passage of the first Subway Act (Laws of 1884, chap. 534), the plaintiff owned and operated numerous overhead electrical lines and wires in the city of New York extending from its central offices and crossing the streets and highways to premises protected by its service, and in January, 1883, it was furnishing protective service to 927 subscribers, and in January, 1884, to 997 subscribers. This business has since grown so that at the present time plaintiff is operating nearly 4,500 miles of wire in the entire city of New York, whereof 4,404 miles are in the borough of Manhattan serving 2,520 subscribers. It has expended for construction since 1883 more than \$1,500,000, and the value of the property employed in its business at the time of the trial was over \$1,000,000. Under the agreement made between the Holmes Burglar Alarm Telegraph Company and the American District Telegraph Company there was no provision made for the sale of any franchise belonging by the latter to the former.

Plaintiff's business since incorporation has been furnishing protection from burglary to banks, commercial establish-

ments and residence and other buildings, which service is performed principally by means of electric signals, devices and appliances operated by electrical wires and conductors extending from various stations and central offices, which originally were overhead and so continued until 1891, in which year, pursuant to the provisions of chapter 499 of the Laws of 1885, establishing a board of commissioners of electrical subways in cities of 1,000,000 population and over, to enforce the requirements of the act of 1884 as to placing wires underground, plaintiff began gradually to place its wires in the subways and so continued until, at the time of the trial of this action, the greater part of its wires were in the subways both in the boroughs of Manhattan and Brooklyn. The placing of plaintiff's wires in the subways was done under the direction of the board of electrical control, which was the successor of the board of commissioners of electrical subways (Laws of 1887, chap. 716), and all the location of its wires underground has been done by plaintiff pursuant to the direction of said board and its successors in the control of electrical telegraph lines and conductors in the city of New York.

Down to the year 1910 plaintiff's franchise was never questioned either by the State or by the city of New York, and it continued to carry on its business without interference from either, and its existence was recognized not only by the compulsion exercised upon it to put its wires in the said subways and pay for the space therein, but also by special franchise taxes levied upon it amounting in sixteen years to over \$57,000 by the State Comptroller collecting from it its share of the expenses of the maintenance of the subway commissioners, and by the city of New York making contracts with it for its burglar alarm service. As the result of doubts raised as to the validity of plaintiff's franchise, in 1910 plaintiff was required to file a verified petition with the board of estimate and apportionment for a franchise before a day fixed, with which plaintiff, without waiving its legal rights, complied but stated it did so provided the permission were granted upon terms that would not prejudice, impair or limit any of the rights heretofore acquired and now owned or possessed by the company to use the streets of the city of New York. No action having been taken upon this petition, the present suit

was commenced to prevent any interference by the city or its officials with plaintiff's continuance of its business and its use of the streets and the subways, and thereafter an agreement was made by which certain payments were made by the plaintiff to the city of New York in consideration of what is commonly known as a secondary franchise; but without prejudice to plaintiff's rights or claims. It appears that for the rights thus given the plaintiff was required to pay the sum of \$25,000 in cash, with an additional annual sum of \$15,000 for the first five years of the franchise, \$20,000 for the second five years, and \$25,000 for the remaining term of the franchise, which was to expire in 1928, with a privilege of renewal for a further period of ten years.

Plaintiff claims that when it obtained its certificate of incorporation from the State in 1883 and was organized, under the provisions of the acts of 1848 and 1853, as a telegraph company, the State conferred upon it, in common with all other corporations organized under said act, the right to use the streets of New York for its overhead wires, without the need of local or municipal consent; that as the subway acts operated to convert plaintiff's overhead franchise into an underground franchise and to ratify and confirm its rights in the streets, those rights were also not subject to question or attack by the city but were effectual without the city's consent. Plaintiff also claims that if it should be held that its franchise in the streets was not conferred upon it by reason of its incorporation, such franchise had become vested in plaintiff by the use, occupation and expenditure of time and money in good faith on the strength thereof long prior to the present controversy, and the validity thereof is established by acquiescence; and that the city of New York is estopped to deny the same and forbidden by law to destroy or impair it.

The learned trial court has found against plaintiff upon both these propositions. As to the first, it has held that plaintiff's assumption of the corporate powers and franchise of a telegraph company, so far as its business was concerned, was wholly unauthorized. In so determining it held that the word "telegraph" as used in the acts of 1848 and 1853 applied only to corporations whose business it was to receive messages or communications between individuals and others and to

transmit them from one place to another commonly by the use in some form of the electrical telegraph or telephone. The court held that the business conducted by plaintiff was in no sense that of a telegraph company but simply that of protecting buildings and their contents against burglary, fire and other injuries, and that, although electricity or wires conducting an electrical current were used in such business, they were merely incidental thereto, and that their use did not constitute a telegraph use nor bring the plaintiff within the scope of the acts in question. The court also held that, although the certificate of incorporation stated that the company was organized as well to do a general telegraph business, no force could be given to those words, they should be treated as surplusage, and that neither plaintiff nor its predecessors in fact ever conducted such a business. (See *Holmes Electric Protective Co. v. Armstrong*, 97 Misc. Rep. 184.)

While this question is an interesting one, I do not think it is properly raised in this case, nor that it can be determined as between the parties now before this court. The certificate of incorporation of the plaintiff upon its face complied with the requirements of the acts under which incorporation was sought. The State of New York created plaintiff a corporation pursuant to the terms of those acts, and it thereby became incorporated as a telegraph company. If the plaintiff has exceeded its lawful corporate powers, if it has forfeited its right to exercise its corporate powers or any part thereof by reason of nonuser, or if the validity of the incorporation itself is subject to any attack, those questions must be raised by the State of New York under whose authority the corporation was formed, and plaintiff's corporate existence or powers cannot be collaterally attacked. It is quite true that the complaint asks for relief by way of an adjudication that plaintiff at the time of its incorporation in 1883 had, and ever since has had, and now has, a good and valid franchise and vested right to erect, construct and operate electric telegraph lines, wires and conductors in, over, upon and under the streets and highways of the city of New York. But this is only the legal conclusion which is deduced from plaintiff's incorporation by the State, and the plaintiff has not voluntarily tendered any issue as to the validity of incorporation, but

stands upon the fact of its incorporation in 1883, under the laws in question. No issue as to the fact of such incorporation is tendered by the answers interposed herein. If then the defendants desired to test the validity of plaintiff's incorporation or its right to do business thereunder, or its power to exercise any of the privileges thereby conferred, or the exercise by it of powers in excess of its corporate rights, it was necessary to have these issues raised by the People of the State of New York, without whose presence before the court, as it seems to me, no adjudication upon these points would be effectual. In fact the appropriate remedy would seem to be one brought by the People of the State of New York by whom the franchise was granted, if in the judgment of the proper State officials any cause for such an action existed. (See *City of New York v. Bryan*, 196 N. Y. 158; *New York Central & Hudson River R. R. Co. v. City of New York*, 202 id. 212; *Matter of Brooklyn Elevated R. R. Co.*, 125 id. 434; *People ex rel. East River Terminal Railroad v. Board of Tax Comrs.*, 160 App. Div. 771; *People ex rel. Karl v. United Traction Co.*, 145 id. 645.) This conclusion, therefore, leads to our disagreeing with the determination of the learned trial court that plaintiff acquired no rights whatever to a franchise as a telegraph corporation by reason of its incorporation, inasmuch as such question was not properly before the court for determination. In so doing, however, we do not intend to indicate any opinion as to whether or not the language of the telegraph acts was sufficiently broad to cover the field of plaintiff's activities.

Assuming that the plaintiff was lawfully incorporated as a telegraph company under the statutes in question, did it acquire thereby any special franchise to operate wires over or under the streets of the city of New York without the permission of the appropriate municipal authorities? In other words, beside the corporate franchise which plaintiff received from the State of New York, was it also required before it could use the city streets to obtain from the city authorities a special (or so-called secondary) franchise? Plaintiff stands upon the proposition that its certificate of incorporation gave it, under the language of chapter 265 of the Laws of 1848 (§ 5) and chapter 471 of the Laws of 1853 (§ 2),

hereinbefore referred to, a franchise to erect and construct from time to time the necessary fixtures for lines of telegraph upon, over or under any of the public roads, streets and highways, and through, across or under any of the waters within the limits of the State; provided that the same should not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters. Among the cases cited in support of the proposition that the franchise granted by the State is all that is required and that no secondary franchise is requisite, are *Village of Carthage v. Central New York Telephone Co.* (185 N. Y. 448); *Barhite v. Home Telephone Co.* (50 App. Div. 25), and *New Union Telephone Co. v. Marsh* (96 id. 122). But in *Matter of New York Independent Telephone Co.* (133 App. Div. 635) it was remarked that in none of those cases had the attention of the court been directed to chapter 483 of the Laws of 1881 (amdg. Laws of 1879, chap. 397, § 1). I think that the decision in that case is controlling here. The facts therein were as follows: The original corporation was the Mercantile Safe Deposit Company organized under chapter 613 of the Laws of 1875, which as far back as 1890 had made application for leave to put its wires in the subway in New York city which had been denied, its purpose being to continue telegraphic connection with a police station. Thereafter, on April 5, 1894, the persons interested in the Mercantile Company organized the Mercantile Electric Company for the purpose of "constructing, owning, using and maintaining a line or lines of electric telegraph or telephone in the city of New York, and for the purpose of operating and conducting electric currents in and through the streets of the city of New York," and this company in 1894 asked the board of electrical control for permission to have its necessary wires placed in the subway, which was granted, and space was assigned for its wires by the Empire City Subway Company in the latter's subways. In 1905 the Mercantile Electric Company filed with the Secretary of State a certificate of the extension of its lines by which it purported to cover any and all of the public streets, avenues, highways and other public places and waters in the city of New York from a point or points in said city to and connecting all other points in said

city and in each and every borough thereof; the whole State of New York, and from the most southerly point of Mexico to the most northerly point of Canada, and from the most westerly point of the United States and Canada to the most easterly point of the United States and Canada, and also by cable and other appropriate means with the rest of the known world. On February 20, 1905, the New York Independent Telephone Company was incorporated for the purpose of constructing, buying, leasing or owning lines of electric telegraph and telephone wholly within the State, and also lines partly within and partly beyond the State, and on October 7, 1905, it merged with the Mercantile Electric Company, which conveyed to it the latter's property rights, privileges and franchises of every kind, including the franchise, right or consent to lay and construct suitable wires in subways, granted by the board of electrical control. In July, 1907, the telephone company requested permission from the commissioner of the department of water supply, gas and electricity to string a cable in a duct previously assigned to the Mercantile Electric Company and such application having been refused, the company applied for a peremptory writ of mandamus to compel the commissioner to grant the application, which having been denied, an appeal was taken to this court. In affirming the order denying the writ of mandamus, Mr. Justice CLARKE quoted in full the provisions of chapter 483 of the Laws of 1881, amending section 1 of chapter 397 of the Laws of 1879, as follows: "Any company or companies organized and incorporated under the laws of this State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this State, subject to all the provisions of law in reference to such companies not inconsistent with this act; provided that such company shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein



set forth." Mr. Justice CLARKE said (p. 645): "This act continued unrepealed until by chapter 219 of the Laws of 1909, being chapter 63 of the Consolidated Laws, the Transportation Corporations Law, it was annexed bodily to section 102. This is legislative recognition, as it seems to me, that telephone and telegraph companies have, during all this period, been governed by the same provisions requiring the consent of the local authorities as have the other companies which occupy the streets under the surface. It follows that when the original certificate was filed there were existing provisions of law which required the consent of the local authorities, to wit, the board of aldermen, which consent was never applied for or granted.'

Upon appeal to the Court of Appeals the order was affirmed, upon the opinion of Mr. Justice CLARKE in this court (200 N. Y. 527). That the legislative department of the municipal government was originally the sole source of the grant of a secondary franchise (as distinguished from any administrative department) had been decided in *Ghee v. Northern Union Gas Co.* (158 N. Y. 510) and *People ex rel. West Side Electric Co. v. Consolidated Telegraph & Electrical Subway Co.* (187 id. 58). That the mere fact of incorporation under the telegraph acts did not confer a franchise to use the city streets without the consent of the appropriate local authorities necessarily follows as well from the decision of the Court of Appeals in *Matter of New York Electric Lines Co.* (201 N. Y. 321) and the reasoning followed in the opinion of Judge HAIGHT therein (affd., *sub nom. New York Electric Lines v. Empire City Subway*, 235 U. S. 179). The decision in *Matter of Long Acre Electric Light & Power Co.* (188 N. Y. 361) is in no way inconsistent with these holdings, for there the municipal authorities, as the opinion shows, had as far back as 1887 granted a secondary franchise to one of the company's predecessors in title. It follows that when the plaintiff was incorporated, its franchise from the State gave it no right (in view of the provisions of chapter 483 of the Laws of 1881) to construct and lay underground any lines of electric conductors in New York city without the consent of the appropriate local authorities (constituting the so-called secondary franchise) and that consent it never received until the action of the board of estimate and apportionment in September, 1914,

resulting in the contract between the city of New York and the plaintiff, made October 14, 1914. No action, or failure to act, upon the part of the city authorities constituted an estoppel so as to dispense with the necessity for such consent, or furnished a substitute therefor. This conclusion requires a negation of all the contentions raised by the plaintiff as to its rights to place its wires underground or in the subways without the consent of the local authorities. Undoubtedly this is the only vital question to plaintiff, as the successful operation of its business would be impossible without the right to have its conductors installed in the underground conduits. But I am of opinion that its claim to have a franchise to use the streets of the city of New York for the construction and maintenance of its overhead wires is also untenable. Certainly since the passage of chapter 534 of the Laws of 1884 and chapter 499 of the Laws of 1885 it can claim no such rights which survive a demand by the local authorities that such wires be removed. (*American Rapid Telegraph Co. v. Hess*, 125 N. Y. 641.) As to its Brooklyn lines, plaintiff has been using underground wires which it leases from the New York Telephone Company since the installation of the subway system in that borough. Before it began to place its wires in the Manhattan subways, plaintiff's wires were run over housetops and elsewhere over and along private property, no material use being made of the city streets, except as they were spanned by wires running from housetop to housetop. As to all its city wires, it appears that when it placed underground such as were in existence and operation over the housetops on June 14, 1884, they were not placed in subways whose location corresponded with the former lines or routes overhead, but they were laid under and along the streets of the city on new or different routes.

There is no proof that any of plaintiff's overhead wires, placed in position before June 14, 1884 (when the first act requiring the placing of wires underground took effect), are still maintained in the same position, or follow the same routes. The same is true as to the period ending January 1, 1898, when the Greater New York charter (Laws of 1897, chap. 378) took effect. After the latter date, no perpetual franchise to use the city streets could be granted (§ 73, as amd. by

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Laws of 1899, chap. 564; Laws of 1901, chap. 466, and Laws of 1905, chap. 629).

The judgment appealed from is affirmed, but solely upon the ground of plaintiff's failure to procure at any time before the commencement the consent of the municipal authorities, constituting the special (or secondary) franchise, and not because plaintiff was improperly incorporated under the telegraph act. The appropriate changes in the findings of fact and conclusions of law to conform to this opinion will be made, the order to be settled on notice, and the judgment appealed from will thereupon be affirmed, with costs to respondents.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concurred.

Judgment affirmed, with costs. Order to be settled on notice.

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In the Matter of the Application of the STATE COMMISSION OF PRISONS, Appellant, with Regard to the Construction and Improvement of the County Jails Situated at Rome and Utica in Oneida County.

BOARD OF SUPERVISORS OF ONEIDA COUNTY and Others,  
Respondents.

Fourth Department, January 16, 1918.

**Prisons — application by Prison Commission to compel board of supervisors to place lavatory and water closet in each cell of county jails.**

Where the State Prison Commission upon approving plans submitted by a board of supervisors for the improvement of county jails imposed a condition that a separate lavatory and water closet be installed in each cell, but the board let the contract ignoring said condition, and at about the time of the commencement of the work the State Commission applied under section 52 of the Prison Law for an order to compel the board to conform to the condition imposed, which application was denied, but no restraining order was obtained or applied for by the Commission and the improvements have been completed, and it appears that the jails in question are to be used as detention jails only, and that in the men's department in each jail, no criticism having been made of the women's

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departments, there are provided four water closets and eight shower baths, the order of the Special Term denying the application of the Prison Commission should be affirmed.

APPEAL by the State Commission of Prisons from an order of the Supreme Court, made at the Herkimer Special Term and entered in the office of the clerk of the county of Oneida on the 17th day of September, 1917, denying its application to compel the board of supervisors to place a lavatory and water closet in each cell of two jails of Oneida county.

*Merton E. Lewis, Attorney-General [Edward G. Griffin, Deputy Attorney-General, of counsel], for the appellant.*

*Harry N. Harrington, for the respondents.*

PER CURIAM:

Oneida county now has a jail farm upon which buildings are to be constructed where term prisoners are to be kept. The county also has two jails, one in the city of Utica and one in the city of Rome. These jails were built many years ago. There have just been completed in these jails considerable improvements at a large cost to the taxpayers. The board of supervisors caused the plans for such improvements to be submitted to the State Prison Commission for its approval before awarding the contract for the work of such improvements. The Commission approved the plans except that it imposed a condition that a separate lavatory and water closet should be installed in each cell. The board of supervisors let the contract, however, ignoring this condition. At about the time the work under the contract began, the State Commission applied to the Supreme Court, at Special Term, for an order to compel the board of supervisors to conform to such condition as to the cells. A hearing was had upon such application, resulting in the order under review, granted pursuant to section 52 of the Prison Law (Consol. Laws, chap. 43; Laws of 1909, chap. 47). This hearing took place on the 9th of June, 1917, and thereupon additional affidavits were permitted to be submitted and the order appealed from was not made and entered until the 17th day of September, 1917. No restraining order was obtained

or applied for by the State Commission and the work of the improvements has gone on to completion.

The record shows that as soon as the jail farm is equipped, the two jails are to be used as detention jails only. No criticism seems to have been made of the women's departments in these jails which are equipped with lavatories, water closets and bathtubs. In the men's department in each jail there are provided four water closets and eight shower baths. It also appears that many of the prisoners have the freedom of the corridors daytimes and the ventilation of the jails and their sanitary condition are not criticised, except in the respect that each cell is not equipped with a lavatory and water closet.

In view of the peculiar circumstances of this matter, and disclaiming any intention on the part of this court to undertake the administration of the Prison Law, we do not think we should disturb the conclusion reached by the Special Term. If we had been called upon to act before the work of improvement had been entered upon, quite a different question would have been presented.

It follows that the order appealed from should be affirmed, but without costs.

All concurred.

Order affirmed, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN W. FISKE, Appellant, v. HENRY BANTZ and HERBERT D. MACFARLAND, as Inspectors of Election in the Third Election District of the Third Ward of the City of Mount Vernon, N. Y., and Others, Defendants, Impleaded with EDWARD F. BRUSH, Respondent.

Second Department, January 16, 1918.

**Elections — mandamus — correction of return of canvass of soldier votes.**

Where local inspectors, not provided with tally sheets as required by section 334 of the Election Law, as amended, after they had canvassed soldier votes, returned the result, a candidate for mayor upon affidavit that he had

been informed by an inspector and a watcher that the true results of the count had been transposed by the inspectors, is not entitled to a writ of mandamus to correct the return, as the court has no power in such proceeding to open the ballot box and direct a recanvass of the votes so cast.

But clerical errors on the return or made apparent by not agreeing with the tally sheet may be thus corrected.

The Election Law, section 520, does not take away the safeguards for the correction of errors, but merely declares that soldiers' and sailors' elections may be contested like other elections by citizen voters.

APPEAL by the relator, Edwin W. Fiske, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 26th day of December, 1917, denying his application for a peremptory writ of mandamus directing the opening of the ballot box and canvassing the ballots of soldiers, sailors and marines cast in the third election district of the third ward of the city of Mount Vernon, N. Y., on December 18, 1917, and directing the above-named inspectors of election to correct the return of the canvass of the aforesaid votes heretofore filed by them with the commissioners of election, so as to conform with the recanvass thus made, also directing the commissioners of election to receive and file such corrected statement and return in place of the statement of canvass and return already made, and then to transmit said corrected return to the county board of canvassers for the county of Westchester, and directing such county board to canvass such corrected statement and return, also directing the city clerk of Mount Vernon to receive back said ballots, and to retain the same on file in his office, as required by law.

The local inspectors of the third election district of the third ward in the city of Mount Vernon received thirteen votes of soldiers, sailors and marines, duly forwarded to the county board of elections from the Secretary of State under the provisions of the Laws of 1917, chapter 815. The local inspectors met on December 18, 1917, to canvass these votes. They had not been supplied with any tally sheets, as provided by the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], § 334, as amd. by Laws of 1913, chap. 821). One of the inspectors, however, tallied the votes as counted upon a yellow

sheet, which, being unofficial, was not preserved. After they had canvassed the votes for mayor of Mount Vernon, the inspectors returned the result as eight votes for Edward F. Brush, and five votes for Edwin W. Fiske. Subsequently Mr. Fiske, the relator, made affidavit that he had been informed from an inspector and from a watcher that in this return the inspectors had transposed the true results of the count, which was supported by an affidavit from a Republican inspector that he had tallied these votes, and had himself announced the result as eight votes for Fiske and five votes for Brush; that if the return showed otherwise it must be error.

Mr. Justice TOMPKINS denied this motion for mandamus. He held that the right of the county canvassers to summon district inspectors of election to correct their return applied only to clerical errors, such as might appear on the return or upon the tally sheets; that relator's proper remedy was by quo warranto. (See *People ex rel. Fiske v. Inspectors of Election*, 102 Misc. Rep. 136.) The relator has appealed.

*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for the appellant.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for the respondent.

PER CURIAM:

We agree with the learned justice at Special Term that this relator could not have mandamus in this proceeding. Clerical errors on the return, or made apparent by not agreeing with the tally sheet, may be thus corrected. (Election Law [Consol. Laws, chap. 17; Laws of 1909, chap. 22], § 432, as amd. by Laws of 1913, chap. 821; *Matter of Stewart*, 155 N. Y. 545.)

But in the present proceeding the courts have not power to open the ballot box and direct a recanvass of the votes so cast. (*People ex rel. Brink v. Way*, 179 N. Y. 174; *People ex rel. March v. Beam*, 188 id. 266; *Matter of Hearst v. Woelper*, 163 id. 274; *Matter of Tompkins*, 23 App. Div. 224; *Matter of Election of Member of Assembly*, 18 Misc. Rep. 391.)

Section 520 of the Election Law does not take away these safeguards, but merely declares that soldiers' and sailors'

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elections may be contested like other elections by citizen voters.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order of December 26, 1917, affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN W. FISKE, Appellant, v. EDWARD M. ANDERSON and EDWARD H. KENT, as Inspectors of Election of the First Election District of the Third Ward of the City of Mount Vernon, N. Y., and Others, Defendants, Impleaded with EDWARD F. BRUSH, Respondent.

Second Department, January 16, 1918.

**Elections — mandamus to compel inspectors of election to correct return as to soldier votes — intention of voter.**

Where a soldier ballot marked " Dr. Brush " had not been protested, and the inspectors of election had credited the vote to Edward F. Brush because such intention of the voter was clearly apparent, a writ of mandamus will not lie to compel the inspectors of election to correct their return.

APPEAL by the relator, Edwin W. Fiske, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 26th day of December, 1917, denying application for a peremptory writ of mandamus to the inspectors of election above named to correct their return, which included among the votes counted for defendant Edward F. Brush a ballot for mayor, marked " Dr. Brush." Such denial was stated to have been because said ballot had not been protested, and besides the inspectors of election had properly credited this vote to Edward F. Brush because such intention of the voter was clearly apparent.



*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for the appellant.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for the respondent.

PER CURIAM:

The order should be affirmed on both grounds, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order of December 26, 1917, affirmed on both grounds, with ten dollars costs and disbursements.

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In the Matter of the Application of EDWIN W. FISKE,  
Appellant, for a Peremptory Writ of Mandamus.

EDWARD F. BRUSH, Respondent.

In the Matter of the Application of EDWARD F. BRUSH,  
Appellant, for a Peremptory Writ of Mandamus.

EDWIN W. FISKE, Respondent.

Second Department, January 16, 1918.

**Elections — canvass of soldier ballots — intent — constitutional law.**

Under section 514 of the Election Law, as amended by chapter 815 of the Laws of 1917, relating to the canvass of soldiers' votes, providing "that no ballot shall be rejected as void where the intent of the voter is clearly apparent," the determination of the question of intent is one of fact, and the power to pass thereon is lodged with the inspectors of election.

Where, in an election conducted at a military camp, one ballot was voted for mayor in the blank space for city chamberlain and another in the space for superintendent of the poor, and it appears that there was no vacancy to be filled for the office of superintendent of the poor, and that the city had no such office as city chamberlain, the local inspectors of election were justified in finding that such ballots were valid and could be counted for mayor.

The intent of the voter should be gathered from the face of the ballot itself, and the local inspectors cannot be governed by extrinsic evidence or by affidavits.

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A ballot on which the voter had twice written his name and address, stating that he voted "the straight Democratic ticket," was also properly counted.

Such ballot is not in contravention of the Constitution because so marked. Section 1 of article 2 of the Constitution, securing the vote to soldiers and sailors in actual service, does away with objections which might otherwise render the ballots in question void.

PUTNAM, J., dissented as to the ballot containing the written declaration.

APPEAL in each proceeding by the relators, Edwin W. Fiske and Edward F. Brush, from parts of an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 26th day of December, 1917.

In the second election district of the fourth ward of the city of Mount Vernon one ballot was voted for Fiske in the blank space for city chamberlain, and another in the space for superintendent of the poor, and a third ballot was marked otherwise than in the proper voting space. There was written twice on this ballot: "I, Patrick W. McCarthy, of 7 Short Street, Mt. Vernon, N. Y., vote the straight Democratic ticket." Signed, "Patrick W. McCarthy, 7 Short Street, [Mount Vernon] N. Y." The election inspectors had returned all these ballots as "protested," but had counted the three for Edwin W. Fiske for mayor. Both opposing candidates applied for a mandamus, which proceedings were consolidated.

The learned justice at Special Term held, by his order entered December 26, 1917, that the McCarthy ballot was properly canvassed, but that the other two ballots should not have been counted for the office of mayor, and directed a mandamus to issue to such inspectors to make such correction.

The relator Fiske appealed from so much of said order as rejected the two ballots marked respectively in the printed spaces for city chamberlain and superintendent of the poor, and the relator Brush took an appeal from so much of the order as approved the counting of the ballot of the voter with the name Patrick W. McCarthy written thereon.

*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for Edwin W. Fiske.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for Edward F. Brush.

## PER CURIAM:

The present statute for elections by soldiers, sailors and marines (in compliance with the Constitution, art. 2, § 1) contains an important exception not found in the prior statute for voting in the Spanish War (Laws of 1898, chap. 674). As the formalities for testamentary acts are modified for soldiers and mariners who may make nuncupative wills (Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 16), so the Legislature has given authority to count ballots that may not be perfect in form by the proviso "that no ballot shall be rejected as void where the intent of the voter is clearly apparent." (Election Law, § 514, as amd. by Laws of 1917, chap. 815, § 6.)

The determination of the question of intent is one of fact. Such power to pass on the voter's intent is lodged with the inspectors of election. Such election conducted in a military camp might leave the soldier uncertain where to mark his vote, when there was before him a general ballot printed by the Secretary of State, which did not accurately show the local offices to be filled in the city of Mount Vernon. We are all agreed that, inasmuch as there was no vacancy to be filled for the office of superintendent of the poor, and Mount Vernon had no such office as city chamberlain, the local inspectors of election could rightly find that such ballots were not void, and that they could be counted, as the inspectors proceeded to do, for the relator Fiske. We are also of the view that such intent should be gathered from the face of the ballot itself, and that the local inspectors cannot in such count be governed by extrinsic evidence or by affidavits.

The majority of the court are also of the opinion that the ballot with the name Patrick W. McCarthy written thereon was properly counted for the relator Fiske.

The express provisions of the Constitution (Art. 2, § 1) securing the vote to the soldier and sailor in actual military service of the United States, dominates the situation, doing away with what might otherwise be a valid objection to the ballot in question. The intent of the voter is clearly apparent, as found by the local inspectors and the learned justice below. Referring to the alleged marking of the ballot by the written declaration thereon that the soldier voted the straight Demo-

cratic ticket, signed with his name and address, and the claim that the counting of such ballot violates the constitutional requirement of secrecy, the right of an elector is conferred by the Constitution, and whenever he exercises that right in conformity with the methods prescribed by law, he is entitled to see that his vote is given full force and effect in the determination of what persons were elected to office. (*People ex rel. Deister v. Wintermute*, 194 N. Y. 99.) The People of the State have by express provision of the Constitution, in the 1st section of article 2, declared that no elector in the actual military service of the State or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from his election district; and that the Legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Here is a complete statement of the fundamental law, and an express direction to the Legislature to make it effective. The Constitution then goes on (Art. 2, § 2) to exclude certain persons from the right of suffrage, barring those who receive or pay money as compensation for the giving or withholding of a vote, or who make promises with that end in view, or who are interested in wagers on the result. Section 3 declares that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in navigation; nor while a student at a seminary or the inmate of a public almshouse or asylum, nor while confined in prison. Then follow, in section 4, provisions for registration of the voters before they shall be entitled to vote.

This is followed by section 5:

“All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.”

We are of opinion that the McCarthy ballot is not in contravention of the Constitution. From the necessities of the case, the soldier and sailor vote in camps at the front, and on board warships, cannot be subjected to the many

precautions and protections thrown about the election at home, and there is no such requirement in the positive direction to the Legislature found in section 1. The basic provision is that the man who is serving his country shall not be deprived of his vote. Registration is necessarily done away with. Bi-partisan election officials cannot be provided. The law of 1917 (Chap. 815), under which McCarthy's vote was cast, preserves the vote by ballot, and every possible means is provided to assimilate the casting of the soldier's vote with the method pursued in the cities, towns and villages. But through all this, there stands the right of the soldier to vote, dominating everything else. McCarthy voted by ballot; there is no suggestion that, at the time he voted, his vote was not secret. We do not construe his declaration that he voted the straight Democratic ticket as a joke, or a mere flamboyant demonstration of party loyalty. He was far away from home. Under the Constitution he had the right to vote for every candidate for public office that his more favored fellow-citizen voted for in the safety of his home city, surrounded by all the paraphernalia and conveniences of the election machinery. Sample ballots, the party emblem on the ballot, the right to assistance in casting his ballot, if necessary — all these were denied the soldier. He intended to vote for the regular nominees of the party with which his political beliefs coincided, but he was not furnished with the names of all of them, or the emblem which the Legislature has provided for the guidance of the voter. He, therefore, announces that he votes the straight Democratic ticket.

With the policy of the Nation and the State, in this great crisis presented to us, with the positive command of the Constitution before us, we are not prepared to say that he has lost his vote under the existing conditions. The situation was forced upon him by the failure of the election officials at home to furnish him with the list of candidates, with a statement of the party to which such candidates belonged, and with the party emblem attached, that is furnished to and confronts every other voter when he exercises the franchise on election day. Marked ballots are contrary to the spirit of our election laws, because, through such marks, it may be determined how an elector voted, and the door to corruption, intimidation and

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the like may be opened. The courts have construed the law strictly to avoid this evil. But, in our opinion, the important thing, the fundamental thing, in the case of the soldier vote, is the absolute right of the man removed from home, and the surroundings which would make it just and proper to hold him to strict observance of the regulations — the right of this man to cast his vote, unaffected by such informality as is here pointed out. We do not say that, if there were proof of corruption or wrongdoing on the part of the soldier or sailor, this fundamental right would overbalance the wrong. But in this case we find no such thing, and in this first election in the great war we think the courts should see to it that the right of this soldier to cast his vote should be protected and that the vote should be counted.

The order of the Special Term is, therefore, modified to reverse the decisions under the appeal of relator Fiske, and to affirm the determination as to the McCarthy ballot; and as thus modified the order is affirmed, but without costs.

Mr. Justice PUTNAM, however, dissents in respect to the McCarthy ballot on the ground that the writings thereon violated the requirement for secrecy of such vote. (*People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. 395, 403, afterwards carried into the Constitution, art. 2, § 5.) (See *Pennington v. Hare*, 60 Minn. 146, 150.)

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred; PUTNAM, J., dissented only as to the McCarthy ballot.

Order of December 26, 1917, reversed, so far as it rejected the ballots marked in the blanks for superintendent of the poor and city chamberlain, but affirmed as to the ballot of McCarthy.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN W. FISKE, Relator, v. HENRY BANTZ and HERBERT D. MACFARLAND, as Inspectors of Election in the Third Election District of the Third Ward of the City of Mount Vernon, N. Y., and Others, Respondents, Impleaded with EDWARD F. BRUSH, Appellant. (Proceeding No. 2.)

Second Department, January 16, 1918.

**Elections — challenge as to capacity of voters does not constitute a protest or render their ballots “ protested.”**

A paper filed by a duly appointed challenger for a political party merely questioning the capacity of certain persons in the military service to vote and not relating to the form or marking of any of their ballots, constitutes a challenge and not a protest, and was properly overruled by the inspectors of election.

The ballots of such voters when subsequently counted were not “ protested ” and, therefore, the inspectors cannot be ordered to place such ballots among “ protested, void and wholly blank ballots.”

APPEAL by the defendant, Edward F. Brush, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 7th day of January, 1918, directing the inspectors of election of the third election district of the third ward of Mount Vernon to open the ballot box and take out all the ballots cast by soldiers, sailors and marines, as theretofore canvassed on December eighteenth, and to place same in an envelope of protested, void and blank ballots.

After the prior proceeding of December, 1917 (181 App. Div. 702), to recanvass the votes of soldiers, sailors and marines cast in this district, relator applied for a mandamus to such election inspectors, on the ground that they had failed to place all of such ballots in the envelope or sealed package called in Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], § 369, as amd. by Laws of 1913, chap. 821) “ the package of protested, void and wholly blank ballots.” This was because one George M. Percy, a duly appointed challenger for the Republican party, had filed with such inspectors a paper in the following words:

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" I, Geo. M. Percy, a duly qualified elector of Westchester County, State of New York, and a duly appointed challenger for the Republican Party, within and for the 3rd District of the 3rd Ward of the City of Mount Vernon, in said County and State, do hereby severally challenge each and all of the ballots now about to be cast by and on behalf of the following named persons within said District aforesaid on the 18th day of December, 1917, pursuant to the provisions of Article XV\* of Chapter 22 of the Laws of 1909 of the State of New York and known as the provisions relating to ' Soldiers and Sailors Elections ' of the ' Election Law ' of said State of New York, to wit:

" John Scheidberger, Chas. H. Hoag, Jas. L. Hoag, Albert B. Hayward, Kylian H. Koch, John J. Fleming, Wm. R. Johnson, Albert M. Clark, Silas B. Clark, Allen Mulford, Wm. Gray Cathcart, Donald R. Cathcart and Milton W. Morse.

" The grounds of said challenge are the following:

" 1. That said Article XV of said Election Law is unconstitutional and void as being in contravention to the provisions of the Constitution of the State of New York and any election held pursuant thereto and any ballot offered pursuant to the provisions thereof is illegal and void.

" 2. That none of the persons heretofore named and whose ballots are now about to be cast pursuant to said Article XV have registered as legally qualified voters in said Election District and Ward aforesaid, as provided by Section 4 of Article II of the Constitution of the State of New York, and, therefore, none of said persons is entitled to exercise the right of suffrage at this election.

" Dated, MOUNT VERNON, N. Y., *December 18th*, 1917.

" G. M. PERCY."

The Special Term entertaining jurisdiction, ordered the election inspectors of such district to reconvene in the presence of the court at seven P. M. of January 7, 1918, and to open the ballot box, take out those ballots protested and challenged by George M. Percy, and indorse them as protested, and place them in a sealed package thus marked, and deliver same to the commissioner of elections; also to make a supple-

\* Renumbered from art. 19 by Laws of 1913, chap. 800, § 10.—[Rmp.]



mental return to the county board of canvassers. From this order and every part thereof respondent has taken this appeal.

Said inspectors having accordingly reconvened and having thus opened the ballot box, made a return to the writ of mandamus to the effect that all of the thirteen votes so protested had been taken from the ballot box and placed in a sealed package of protested and void ballots, as ordered. The court then, after reciting that upon a recanvass of such votes Edwin W. Fiske had eight votes, and Edward F. Brush five votes, ordered that the board of county canvassers rescind their determination of December 24, 1917, and reconvene, and that such election inspectors Bantz and MacFarland attend before said board; and that such board of county canvassers make a new determination of the true result, which should stand in lieu of their prior determination of December 24, 1917.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for the appellant.

*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for the relator.

PER CURIAM:

The strong probability that the figures of this canvass had been transposed, which is now shown beyond dispute, moved relator to seek some method whereby these ballots might lawfully be taken from such ballot box and recounted. Counsel ingeniously resorted to the theory that the paper presented by the Republican challenger might also be regarded as amounting to a "protest" of all the thirteen ballots, so that they accordingly could be removed from the ballot box, counted, and, by being placed in the package of void, unofficial and protested ballots, be subjected to the powers of immediate court review and recanvass.

We are, however, unanimously agreed that none of these ballots was protested within the Election Law, and that there was no breach of duty by the inspectors after they had counted them in placing them in the ballot box. The paper relied on was a "challenge" and was so described by the challenger who presented it. It was considered and overruled

by the election inspectors before any votes were cast, as the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], § 361, as amd. by Laws of 1916, chap. 537) provides. It questioned the capacity of the military voter to vote at all, not as to the form or marking of any ballot. Having been overruled, the inspectors opened the envelope containing these military ballots, which were then "cast" and counted. The Election Law (§ 369, as amd. by Laws of 1913, chap. 821) provides for review of the form of ballots, and the sufficiency and effect of the voters' marks thereon, if the ballots are objected to, so that the inspectors not only separate such ballots, but note how they are counted; and, over the chairman's signature, indorse in ink a memorandum of whatever objection is made to the counting of such ballot. Challenges, on the other hand, are to the personal qualifications of the voter who offers to vote, and, if such challenge be sustained, his rejected vote is not subject to review in this summary manner. Furthermore, the soldier who votes under these war provisions of the statute of 1917 has in all cases to make and subscribe the oath printed upon the official envelope; so that "if he shall take the oath tendered to him his vote shall be accepted." (Laws of 1917, chap. 815, § 4, amd. Election Law, § 510.) While this probably does not mean that the statement of the soldier's residence to be entered in the poll book, or as taken from the general card register kept by the Secretary of State, would be final and beyond correction, it may fairly be taken as requiring from the voting soldier, in advance of marking his ballot, a like general oath such as the Election Law (§ 363) gives to the citizen voter, whose right to vote is subjected to challenge. No question is made, however, on this argument that the inspectors rightly overruled this challenge.

We are clear that the ballots, when subsequently counted, were not "protested," and, therefore, the inspectors should not have placed such ballots among "protested, void and wholly blank ballots." Although the order treating such ballots as protested must be reversed, the facts thereby made to appear, namely, that the result of the canvass had been transposed, will furnish a further ground for this respondent to ask from the State officials to take a quo warranto proceeding.

The order of January 7, 1918, is, therefore, reversed, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order of January 7, 1918, reversed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* EDWIN W. FISKE, Relator, *v.* EDWARD M. ANDERSON and EDWARD H. KENT, as Inspectors of Election in the First Election District of the Third Ward of the City of Mount Vernon, N. Y., Defendants, Impleaded with EDWARD F. BRUSH, Appellant. (Second Proceeding.)

Second Department, January 16, 1918.

**Elections — inspectors' finding as to validity of ballots of soldiers controlling.**

Under section 514 of the Election Law, as amended, the inspectors' finding that soldiers intended to vote for Edward F. Brush should be controlling although the ballots were marked "Dr. Brush," "Brush" and "Mr. Brush."

APPEAL by the defendant, Edward F. Brush, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 7th day of January, 1918, holding, after recanvass of the vote in the first election district of the third ward of the city of Mount Vernon, N. Y., that the return by such inspectors of election had been correctly made, also that the figures therein had been properly incorporated by the county board of canvassers. From this order the relator has appealed to this court.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for the appellant.

*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for the respondent.

**PER CURIAM:**

The votes in this district were recanvassed under a procedure followed in other districts, but without affecting the

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result. The relator had asked relief against a single ballot marked for mayor "Dr. Brush," without christian name or initials. After recanvass relator further claimed to throw out three ballots; that is, besides the one marked "Dr. Brush," a ballot "Brush," and another "Mr. Brush." As we held, in the third district of the third ward, such ballots had not been legally protested. The order should, therefore, be reversed, because all the ballots for appellant Brush had been canvassed and counted by the inspectors without objection or protest (as has been decided in 181 App. Div. 705), so that there was no authority to reopen the ballot box and recanvass the votes.

Under section 514 of the Election Law (Consol. Laws, chap. 17 [Laws of 1909, chap. 22], as amd. by Laws of 1917, chap. 815, § 6), we add that the inspectors' finding that these three soldiers intended to vote for Edward F. Brush should be controlling.

The order, however, is reversed, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order of January 7, 1918, reversed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWIN W. FISKE, Respondent, Appellant, v. CHARLES C. SCHUM and FREDERICK BEHRMANN, as Inspectors of Election in the Sixth Election District of the Fourth Ward of the City of Mount Vernon, N. Y., and Others, Respondents, Impleaded with EDWARD F. BRUSH, Appellant, Respondent. (Two Proceedings.)

Second Department, January 16, 1918.

**Elections — soldier ballots — mandamus to correct return.**

Where a ballot was marked with the word "Fiske" and the inspectors failed to find the voter's intent to be for the relator Edwin W. Fiske and there was no protest in regard to said ballot, the court, on application for a writ of mandamus to correct the return, has no authority to count said vote for the relator.

A subsequent assertion that all the soldier ballots had been "protested" because of a certain challenge or objection, did not authorize an order for a recount and recanvass.

APPEAL by the relator, Edwin W. Fiske, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 26th day of December, 1917, and also an appeal by the defendant, Edward F. Brush, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 7th day of January, 1918.

In this district one ballot had in the space for mayor of Mount Vernon the name Fiske. In the canvass it was orally disputed whether it should be counted for the relator, but the inspectors finally returned it in a separate line, "Fiske 1," beneath the line giving the total tabulated vote for Edwin W. Fiske. On application for a mandamus to correct this return, so as to read for the relator, the inspectors were called and gave testimony, so that it appears that their final return of this separate vote had been assented to without protest. Mr. Justice TOMPKINS, therefore, ruled that he had not power on that application to direct that this ballot be added to the Fiske total vote. Thereupon, relator took a second proceeding before Mr. Justice PLATT (following the theory invoked in the third district of the third ward), and asserted that all the soldier ballots had been "protested," because of a challenge or objection taken by one T. E. Denton. The inspectors were reconvened before him, and opened the box, took out all ballots, marked all but one (which had been originally protested), and placed them in a sealed package of "void, protested and blank ballots," thus making a recanvass, which added the "Fiske" vote to the total for Edwin W. Fiske. The second proceedings, however, are not printed. This order of PLATT, J., was January 7, 1918, from which respondent Brush appeals to this court.

*George H. Taylor, Jr.* [*James H. Cavanaugh* with him on the brief], for the appellant.

*Arthur M. Johnson* [*Sydney A. Syme* and *Frank A. Bennett* with him on the brief], for the respondents.

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**PER CURIAM:**

In the ballot marked with the word "Fiske" the inspectors might have found an intent to vote for the relator, but they did not so find, and instead, agreed on a separate return, which appeared to treat such vote as not for the relator. As there was no protest in regard to this ballot, we agree that after the inspectors had failed to find the voter's intent to be for relator, the court in the original proceeding was not empowered to count this vote for the relator, and the order of December 26, 1917, must be affirmed, but without costs.

For the reasons stated in the opinion in 181 Appellate Division, 702, decided herewith, we are of opinion that the Denton challenge was not such a protest as authorized the subsequent orders for a recount and recanvass, and that, therefore, such order of January 7, 1918, must be reversed, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order of December 26, 1917, affirmed, without costs. Order of January 7, 1918, reversed, with ten dollars costs and disbursements.

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In the Matter of the Application of FRED F. FRENCH and PEARL P. EDSON, Respondents, for the Voluntary Dissolution of KNAPP & FRENCH, INC.

EDWARD J. KNAPP, Appellant; NATHANIEL PHILLIPS, as Permanent Receiver of KNAPP & FRENCH, INC., Respondent.

First Department, February 1, 1918.

**Corporations — voluntary dissolution — special proceeding — costs — stipulations — stenographer's fees — referee's fees — when opposing stockholder and creditor not personally liable for costs and disbursements — authority of court to stay foreclosure instituted by opposing stockholder — when question not academic — revival of action against permanent receiver after dissolution — duty of court to wind up affairs of dissolved corporation — protection of receivers against actions.**

The General Corporation Law relating to voluntary dissolution of corporations contains no provision with respect to the costs and expenses of the proceeding.

A proceeding for the voluntary dissolution of a corporation is a special one and, therefore, the provisions of the Code of Civil Procedure relating to costs in such proceedings govern.

There is no express statutory provision for taxing stenographer's fees, and the rule is that they are not taxable unless the parties have expressly stipulated that they may be taxed as disbursements.

Where, in a voluntary proceeding for the dissolution of a corporation, the attorneys for the petitioners and for the opposing stockholder who was also a creditor, stipulated that a stenographer be employed at a certain *per diem* fee, and his fee for copies of the minutes was also stipulated, and the affidavit of the stenographer shows that he had an understanding with the petitioners by which they were to pay one-half of his charges, and that it was at the suggestion of one of the attorneys that he entered the stipulation in the minutes in order to bind the opposing stockholder for one-half of his charges, and that thereafter by consent of counsel for the petitioners and for the opposing stockholder he made a minute of the stipulation, said stipulation should not be construed as authorizing the taxation of the stenographer's fees in the proceeding. It was evidently intended that they should be a joint charge against the responsible parties.

Where all parties in interest had notice of the dissolution proceeding and an opportunity to appear, a stipulation, fixing the referee's fees at an increased rate, consented to by all persons, is binding, although not agreed to by the attorney for the temporary receiver. This, because said receiver was not formally a party to the proceeding and had no authority to grant or withhold consent with respect to the referee's fees.

The court necessarily has implied authority to require that the expenses of the proceeding be paid out of the corporate property which it is required to administer and distribute and such is the practice in dissolution proceedings.

The costs and disbursements, with the exception of the stenographer's fees, should be paid by the permanent receiver from the corporate funds and should not be taxed against the opposing stockholder personally.

A stockholder opposing a voluntary dissolution proceeding should not be punished by having the costs and expenses taxed against him personally, because he merely appeared therein, and by interposing an answer obstructed and delayed the proceedings to a certain extent.

The question as to whether the granting of an injunction in a voluntary dissolution proceeding restraining a foreclosure proceeding commenced by the opposing stockholder pending a reference was proper, is not academic, where said stockholder's right to costs of the appeal is involved.

An action to foreclose a lien upon property pledged or upon realty is not an action to recover "a sum of money," within the meaning of section 184 of the General Corporation Law, conferring authority on the court in dissolution proceedings to enjoin certain actions.

A foreclosure action, instituted by an opposing stockholder, pending a reference in a dissolution proceeding, may be stayed by the court, in order to enable the receiver to sell the equity of the corporation.

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By a final order of voluntary dissolution a corporation ceases to exist, and a pending foreclosure action, instituted by an opposing stockholder, can proceed no further until it is revived against the permanent receiver.

When the statutory requirements for the voluntary dissolution of a corporation have been complied with and the corporation dissolved, it becomes the duty of the court to wind up the affairs of the corporation, and to that end to dispose of its property for the interest of the creditors and stockholders.

It is within the inherent power of the court to protect its receivers against actions brought without its consent and to deny its consent to the bringing of such actions and to enjoin any one, and especially a creditor and a party to the proceeding, from interfering with the property, the custody and title to which is in its receiver.

APPEAL by Edward J. Knapp from five orders of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 5th, 28th and 29th days of May, 1917, respectively.

*Edgar J. Treacy* of counsel [*Treacy, Rasquin & Greason*, attorneys], for the appellant.

*John Neville Boyle* of counsel [*Pratt, Koehler & Boyle*, attorneys], for the petitioners, respondents.

*Henry Marx*, for the respondent Nathaniel Phillips, as receiver.

*Robert S. Conkling*, for the Attorney-General.

LAUGHLIN, J.:

On the 31st of March, 1916, the Special Term in Bronx county on a petition in due form and notice of motion to which there was no opposition, made an order as provided in section 178 of the General Corporation Law (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], as amd. by Laws of 1909, chap. 240) requiring all persons interested in the corporation to show cause before a designated referee on the 19th of May, 1916, why it should not be dissolved. Under date of March 26, 1917, the referee made a report in writing in which he found that the allegations of the petition were true and recommended the dissolution of the corporation. The petitioners moved for the confirmation of the report and that the temporary receiver be appointed permanent



receiver on the 4th of May, 1917. On the 4th of May, 1917, a short form order granting the motion was signed by the justice presiding, and the final formal order dated that day reciting the proceedings, dissolving the corporation, making the temporary receiver permanent receiver and awarding costs and disbursements to the petitioners, including the fees of the referee and stenographer to be taxed and requiring that they be paid by the appellant was entered on May 5, 1917. The costs and disbursements of the petitioners were taxed at \$1,573.14, the referee's fees being \$750 and the stenographer's fees being \$680. The appellant then moved for a review and retaxation of the costs but the motion was denied on the 24th of May, 1917. Pending the reference and on the 8th of December, 1916, the appellant commenced an action for the foreclosure of a second mortgage executed by the corporation on real estate which it still owned. After the final order of dissolution was granted the appellant proceeded to bring the issues in the foreclosure action to trial and thereupon the petitioners moved herein for a resettlement of both orders of dissolution by incorporating therein a provision staying appellant from proceeding with the foreclosure of his mortgage until the further order of the court. The motion for resettlement was granted by a short form order signed on the 24th of May, 1917, and by a long form order incorporating the provision with respect to a stay, dated the next day. On the 4th day of June, 1917, the appellant by a single notice of appeal appealed from said five orders *and from each and every part thereof*. Inasmuch as the notice of appeal questioned every step taken in the proceeding it became necessary to print a complete record of all the proceedings. On the motion to confirm the referee's report recommending dissolution there was no opposition and no question is now raised with respect to that part of the order. The only points the appellant presents are with respect to the taxation of the costs against him personally and the stay of proceedings in the foreclosure action. If the appeal had been limited to those points the record on appeal might have been confined to a few pages instead of one thousand pages for the printing of which appellant asks that he be reimbursed.

Knapp & French, Inc., was, in effect, an incorporated

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copartnership, for one-half of the stock was owned by Knapp and the other one-half by French and each of them evidently made a nominal transfer of stock to qualify another as a director. The board of directors consisted of four members, viz., French and one Edson, named by him, and Knapp and one Selikowitz, named by him. It was a domestic corporation organized for the purpose of owning and leasing real property and constructing apartments and other buildings, and its place of business was in Bronx county. The proceeding was instituted for the voluntary dissolution of the corporation by petition of French and Edson and notice of application thereon returnable at Special Term on the 30th day of March, 1916. The petition was evidently based on the provisions of section 172 of the General Corporation Law, for facts were set forth tending to show that there was an even number of directors who were equally divided with respect to the management of the affairs of the corporation and that the ownership of the stock was equally divided between French and Knapp. The petition also set forth in detail various acts on the part of Knapp in violation of the agreement between him and French, made at the time the company was incorporated and charged him with fraudulent misconduct in attempting to obtain control of the corporation and of its affairs and property to the exclusion of French. The order appointing the referee required publication thereof as provided by the statute (§ 179), and required the referee to report to the court as soon as may be the proceedings had before him together with his opinion thereon. The petition on which the order was made, following the requirements of section 174 of the General Corporation Law (as amended by Laws of 1909, chap. 240), contained, among other things, a schedule of the creditors of the corporation and their places of residence and the nature and amount of their claims and an inventory of the property of the corporation and the incumbrances thereon. The order was served on the creditors as required by section 180 of the General Corporation Law. On the return of the order to show cause the petitioners appeared before the referee by attorney, and certain creditors appeared, and appellant Knapp who had appeared specially by attorney appeared in behalf of his

attorney and requested an adjournment which was granted. On the adjourned day, May 24, 1916, the attorney who had appeared specially for appellant Knapp demanded that a copy of the petition be served upon him in accordance with his request in his special appearance, and the referee ruled that he was entitled thereto. He was then shown a copy of the petition and stated that he desired to answer some of the allegations thereof and requested time therefor, and he was given until the twenty-ninth of the month to serve an answer. The referee then proceeded to hear proof of claims, after which the proceeding was adjourned until May thirty-first, and was subsequently adjourned until the tenth of June at which time the then attorney for the appellant asked for a further adjournment which was denied, and he made a frivolous objection with respect to an omission in the copy of the petition served upon him and assigned that as an excuse for not having filed an answer. Some evidence was then received in support of the petition. The then attorney for the appellant took part in the proceeding and interposed various technical objections, and the proceeding was adjourned to the twenty-third of June at which time the attorney for the appellant moved to dismiss the proceeding and on his objection being overruled he filed an answer. The proceedings before the referee were continued and resumed from time to time. They consisted principally of the examination of French in support of the petition and his cross-examination at considerable length by the attorney for the appellant, and with objections and discussion by counsel and with records of the proceedings of the board of directors. On the 4th of October, 1916, the appellant appeared by his present attorneys at which time counsel for the petitioners stated that he had been informed by the attorneys for the appellant that they did not intend to offer any evidence in opposition to the dissolution of the company and that, therefore, he would offer no further evidence in support of the petition but that the remaining proceedings would relate to the claims; and counsel for the appellant acquiesced. The proceedings before the referee down to that time occupy 187 of the printed pages of the record exclusive of exhibits and the subsequent proceedings before the referee occupy 374 printed pages of the record exclusive of exhibits.

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Pending the reference and on the 30th day of June, 1916, the court on motion of the petitioners, opposed only by the appellant, appointed one Phillips temporary receiver of the property of the corporation with power to preserve the property and to collect debts and demands and particularly to manage the premises of the company, known as No. 674 Academy street, borough of Manhattan, and to collect the rents therefrom and to pay all just charges against the property by way of interest on incumbrances, taxes and insurance premiums. On the 30th of April, 1914, the corporation executed a bond for \$6,000 to the appellant, the principal of which was to become due and payable on the 30th of April, 1917, and at the same time executed a second mortgage on said premises No. 674 Academy street as security therefor. This bond and mortgage were proved before the referee on the 4th of October, 1916, and it was shown that the whole amount was due together with all interest thereon from date. The appellant on the 8th of December, 1916, pending the reference, instituted the action to foreclose the mortgage on account of default in the payment of interest, no interest having been paid, and the first installment of interest having become due and payable on the 30th of October, 1914, and he obtained leave of the court to join the temporary receiver as a defendant. Issue was joined in the foreclosure action on the 23d of January, 1917, but it was first noticed for trial for the first Monday of May, 1917, after a motion for confirming the referee's report and for the final order had been noticed. The report of the referee not only found that all of the allegations of the petition were true but that it was for the best interest of the corporation and of its stockholders and creditors to have the corporation dissolved and a permanent receiver appointed to make an equitable distribution of its assets among its creditors, and also that the objection of the appellant having been withdrawn there was no opposition on the part of the stockholders or creditors to a decree of dissolution. With respect to the said premises No. 674 Academy street the referee reported there was a first mortgage for \$38,000 with interest at five and one-half per cent from December 1, 1915, thereon, and a second mortgage held by the appellant for \$6,000 with interest at six per cent from

April 30, 1914, and he found a claim in favor of appellant for water rates paid on account of water supplied to said premises, and also other claims in his favor as a creditor. The petitioners gave notice of a motion for the confirmation of the report on May 4, 1917. On the hearing thereon the attention of the court was drawn to the pendency of appellant's action to foreclose the mortgage, and according to the affidavit of one of the attorneys for the petitioner and of the attorney for the receiver the attorneys for the appellant agreed in open court that the foreclosure action would not be pressed, but the attorney for the appellant by affidavit denied this. The order confirming the report was made on the 5th of May, 1917, and appointed the temporary receiver permanent receiver and he qualified as such. Thereafter the appellant proceeded with the foreclosure action. The petitioners thereupon moved to resettle the order of May fifth by incorporating therein a provision enjoining the appellant from proceeding with the foreclosure action. The motion was heard by the same justice who presided when the original order was granted and after hearing the affidavits, to which reference has been made, the motion was granted. At the time the order was so resettled the permanent receiver was in possession of the real property covered by the mortgage, and pursuant to the authority conferred upon him by section 239 of the General Corporation Law, made applicable by sections 230 and 191 of the General Corporation Law (as amd. by Laws of 1909, chap. 240, and Laws of 1916, chap. 53), he sold at public auction the equity of redemption of the corporation in said real property by expressly making the sale subject to the two mortgages and to the interest due thereon and to the costs of appellant's foreclosure action, and realized thereon the sum of \$3,500. The appellant printed and on September 25, 1917, filed the record on appeal from the five orders. On the eighth of October thereafter the attorneys for the petitioners requested the attorneys for the appellant to consent to a modification of the injunction order by incorporating therein a provision suspending it. The request was denied and thereupon a motion was made for an order to that effect and the order was so amended on the twelfth of November at a Special Term presided over by the justice who had

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granted it. The motion was then made here on the 21st of December, 1917, to dismiss the appellant's appeal in so far as it relates to the stay of the foreclosure action. On that motion it appeared not only that the premises had been sold by the receiver subject to the incumbrances and that the stay had been suspended, but that the purchaser on the receiver's sale had paid appellant's bond and mortgage in full and the costs of the foreclosure action and that the foreclosure action had been discontinued and the *lis pendens* therein canceled. The motion to dismiss the appeal was denied by this court, with costs, on December 28, 1917. (181 App. Div. 930.)

With the exception of the question as to whether the costs and disbursements should be paid by the appellant personally or out of the funds in the hands of the permanent receiver the only items brought in question are the fees of the referee and stenographer. After there had been several hearings before the referee, the proceedings at which cover 103 pages of the printed record on appeal, the minutes show that it was stipulated that one Underwood be employed as stenographer and that he furnish three copies of the minutes, one for the referee "and one each for the use of counsel," and a *per diem* fee and his fee for copies of the minutes were stipulated. There were then present the referee and the attorneys for the petitioners and for the appellant. It will be observed that the stipulation was silent with respect to how or by whom the fees of the referee were to be paid. On the fourth of October, when appellant first appeared by his present attorneys, a verbal stipulation between counsel was made and entered in the minutes to the effect that the referee should be allowed for his services at the rate of ten dollars an hour for all hearings from the commencement of the proceeding and at the same rate for the time required to prepare his report, and the final sentence of the stipulation was "His fees to be taxed as an expense on the administration of the corporate estate." The General Corporation Law relating to dissolution of corporations contains no provision with respect to the costs and expenses of the proceeding. Such a proceeding is a special proceeding (*Matter of Hulbert Brothers & Co.*, 160 N. Y. 9) and, therefore, the provisions of the Code of Civil Procedure relating to costs in special proceedings

govern. Section 3296 of the Code of Civil Procedure provides, among other things, that a referee in an action or special proceeding brought in a court of record is entitled to ten dollars for each day spent in the business of the reference unless at or before the commencement of the trial or hearing a different rate of compensation is fixed by the consent of the parties, other than those in default for failure to appear or plead, manifested by an entry in the minutes of the referee or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him. Section 3240 provides that costs in a special proceeding in a court of record or upon an appeal therein where the costs are not otherwise specially regulated "may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner." Section 3256 provides that a party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements consisting, among other things, of the legal fees "of referees and other officers \* \* \* and such other reasonable and necessary expenses, as are taxable, according to the course and practice of the court or by express provision of law." The affidavit of the stenographer shows that he had an understanding with the petitioner French and one of the attorneys for the petitioners by which the petitioners were to pay for one-half of his charges and that it was at the suggestion of the attorney for the petitioners that he entered the stipulation in the minutes in order to bind the appellant for one-half his charges, and that thereafter by consent of counsel for the petitioners and for the appellant he made a minute of the stipulation as already stated. There is no express statutory provision for taxing stenographer's fees, and the rule is that they are not taxable unless the parties have expressly stipulated that they may be taxed as disbursements. (*Baff v. Elias*, 152 App. Div. 226; *Cohen v. Weill*, 33 Misc. Rep. 764; *Van Valkenburgh v. Bishop*, 164 N. Y. Supp. 86; *Gallagher v. Baird*, 60 App. Div. 29.) Section 251 of the Code of Civil Procedure authorizes the justice presiding at a hearing in an action or special proceeding to order a copy of the stenographer's notes at the expense of

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the parties to the action but evidently the taxation thereof is not contemplated. In view of the phraseology of the stipulation with respect to the stenographer's charges and of the affidavit of the stenographer with respect thereto we are of opinion that the stipulation should not be construed as authorizing the taxation of the stenographer's fees in this proceeding. It was evidently intended that it should be a joint charge against the responsible parties, namely, the appellant and French. (*Adams v. N. Y., Lake Erie & W. R. R. Co.*, 20 Abb. N. C. 180.) The attorney for the receiver contends that inasmuch as the temporary receiver did not consent to the stipulation for the referee's fees at an increased rate above the statutory rate, in the event that those fees are to be paid out of the corporate funds the stipulation should not be deemed binding in respect to the amount of the fees, and that they should have been taxed at the statutory rate which would reduce them to \$300. We are of opinion that there is no force in that contention. The temporary receiver was not formally a party to the proceeding and he had no authority to grant or withhold consent with respect to the referee's fees. All parties in interest had notice of the proceeding and an opportunity to appear. Those who saw fit to appear joined in the stipulation fixing the referee's fees. Such stipulations are customarily made and it is not claimed that the compensation therein provided was exorbitant. But we are of opinion that the costs and disbursements should not have been taxed against the appellant personally. If the court in deciding who should pay the costs and disbursements is to be controlled or influenced by the result of an inquiry or investigation with respect to who was responsible for the conditions necessitating the dissolution proceeding then the order imposing the costs and disbursements on the appellant could be sustained and that is evidently the theory on which it was granted. We think, however, that the Legislature recognized the difficulties that might be encountered in the management of corporations which would necessitate dissolution and regardless of who is responsible therefor authorized a dissolution when certain facts were shown to exist. If the appellant had not appeared in the proceeding it is quite clear that no costs could have been awarded against him. A reference is expressly provided



for in the statute. The court necessarily has implied authority to require that the expenses of the proceeding be paid out of the corporate property which the court is required to administer and distribute and such is the practice in dissolution proceedings. (See *Matter of Muller & Co.*, 21 App. Div. 629; *People v. American Loan & Trust Co.*, 177 N. Y. 467; *Barnes v. Newcomb*, 89 id. 108; *Matter of New Paltz & Walkkill Valley R. R. Co.*, 27 Misc. Rep. 451; *affd.*, 42 App. Div. 622; *Matter of Attorney-General v. North American Life Ins. Co.*, 91 N. Y. 57.) The appellant should not be punished for merely appearing. It is true that he did by interposing an answer obstruct and delay the proceedings and extend the proceeding to a certain extent, but in a sense he was warranted in so doing for the petitioners unnecessarily charged him with fraudulent conduct and acts in the management of the corporation. He had a right to join issue on these charges and the fact that he offered no evidence with respect thereto is not to be taken against him for at that time his attorneys conceded, in effect, that without regard to those issues the corporation should be dissolved on account of its having an even number of directors equally divided in their stock ownership and with respect to the management of the corporation. If it had been shown just what proportion of the expenses were caused by the appellant's interposing an answer and interposing objections and examining witnesses a basis might have been afforded for requiring him to pay some of the disbursements, but that was not done. In any event, the proportionate share of the expenses which might have been taxed against him probably would not exceed the expenses of printing that part of the record on appeal which was essential to a review of the taxation of the costs and disbursements. Therefore, we think substantial justice will be done by reversing the orders in so far as they relate to the taxation of the costs and disbursements, without costs, and by substituting for the provisions imposing such costs and disbursements on the appellant provisions to the effect that they, with the exception of the stenographer's fees, should be paid by the permanent receiver from the corporate funds.

Counsel for the respondents contend now as they contended in support of the motion to dismiss the appeal that the question

as to whether the injunction order was properly granted is academic. It is quite clear, however, that it is not, for the appellant's right to costs of the appeal is involved. (*Matter of Martin v. Johnston Co., Ltd.*, 128 N. Y. 605; *Williams v. Montgomery*, 148 id. 519.)

Counsel for the appellant contends broadly that the authority of the court on a dissolution proceeding is only such as is expressly conferred by statute and that the only statutory provision conferring authority on the court in such proceedings to enjoin actions is contained in section 184 of the General Corporation Law, which relates only to cases where a temporary receiver has been appointed and is limited to enjoining actions against the corporation for the recovery of a sum of money. It is well settled that an action to foreclose a lien upon property pledged or upon realty is not an action to recover a sum of money within the purview of said section 184. (*Matter of Hamilton Park Co.*, 1 App. Div. 375; *Matter of Tarrytown, White Plains & M. R. Co.*, 133 id. 297; *Matter of Binghamton G. E. Co.*, 143 N. Y. 261.) The authorities upon which the appellant relies, however, all relate to temporary receiverships. There is a marked distinction between a temporary receiver, who is a mere custodian without title and does not represent the creditors (*Decker v. Gardner*, 124 N. Y. 334; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 id. 340; *Franklin Trust Co. v. N. A. R. R. Co.*, 11 App. Div. 249; *Mercantile Trust Co. v. Kings County El. R. Co.*, 40 id. 141), and a permanent receiver, in whom the title to the corporate property is completely vested and who represents all the creditors and stockholders. (*Attorney-General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.) It may well be that the temporary receiver was not a necessary party to the foreclosure action but by the final order of dissolution the corporation ceased to exist and the action could proceed no further against it and could in no event proceed until it was revived against the permanent receiver who became the trustee of the property of the corporation for the benefit of its creditors and stockholders. (Gen. Corp. Law, §§ 191, 230, 231, 232, 239, as amd. by Laws of 1909, chap. 240; Laws of 1913, chap. 766, and Laws of 1916, chap. 53; *Shayne v. Evening Post. Pub. Co.*, 168 N. Y. 70; *Martynne*

v. *American Union Fire Ins. Co.*, No. 5, 168 App. Div. 380; *affd.*, 216 N. Y. 183; *Matter of Stewart*, 40 Misc. Rep. 32; *affd.*, on opinion of SCOTT, J., 86 App. Div. 627, and *affd.*, 177 N. Y. 558. See, also, 2 Nicholls N. Y. Pr. § 1605; Fiero Spec. Pr. [3d ed.] 841.) If the court had the power to stay the foreclosure action it is quite clear that the order was properly granted. The only object of the stay was to enable the receiver to sell the equity of the corporation which under the stay he could do speedily as he did by a mere publication of a notice of sale for two weeks as provided in subdivision 4 of section 239 of the General Corporation Law. At any time after the sale it is quite evident that the appellant could have obtained a modification of the order had he seen fit to apply to the court therefor. The only possible prejudice to the appellant by the stay was the delay of a few weeks pending a sale of the equity by the permanent receiver for there was no attempt to interfere with the lien of the mortgage. We are of opinion that the court was fully authorized to grant the stay. It is quite true that in a sense the authority of the court in these proceedings is only statutory, but once the statutory requirements are complied with and the corporation is dissolved it becomes the duty of the court to wind up the affairs of the corporation and to that end to dispose of its property for the interests of the creditors and stockholders. (See *Matter of Dolgeville Electric L. & P. Co.*, 160 N. Y. 500.) As already observed the foreclosure action could not proceed without reviving it against the permanent receiver and it is well settled that it is within the inherent power of the court to protect its receivers against actions brought without its consent and to deny its consent to the bringing of such actions and to enjoin any one and especially a creditor and a party to the proceeding as was appellant from interfering with the property, the custody and title to which is in its receiver. (*Matter of Christian Jensen Co.*, 128 N. Y. 550; *Matter of Schuyler's S. T. B. Co.*, 136 id. 169, 173; *Walling v. Miller*, 108 id. 173; *Woerishoffer v. North River Const. Co.*, 99 id. 398; *Attorney-General v. Guardian. Mut. Life Ins. Co.*, *supra.*) There is, therefore, no merit in the appeal from the injunction order.

It follows that the orders in so far as they relate to the

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taxation of costs and disbursements should be reversed, without costs, and that there should be inserted in the orders in place of those provisions appropriate provisions requiring the payment of the costs and disbursements, with the exception of the stenographer's fees, by the permanent receiver out of the property of the corporation, and that the orders in so far as they relate to the stay should be affirmed, without costs.

CLARKE, P. J., SCOTT, PAGE and SHEARN, JJ., concurred.

Orders in so far as they relate to taxation of costs, etc., reversed, without costs, and order directed as stated in opinion, and orders in so far as they relate to the stay affirmed, without costs. Order to be settled on notice.

JOHN LABER, Respondent, v. MARY LABER, Wife of JOHN LABER, and Others, Defendants, Impleaded with MINNIE KOLB, Appellant.

Second Department, February 8, 1918.

**Real property — partition — appointment of receiver — insufficiency of moving papers — offer of defendant to purchase property at appraised value — form and contents of order appointing receiver.**

Property involved in an action of partition or of foreclosure will not be taken from the party in possession and placed in charge of a receiver during the pendency of the action, except upon clear and convincing proof that there is danger of loss or damage, and that such appointment is necessary for the protection of the parties to the action, and their interests. There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established. Hence, in an action for partition of property owned by three children as tenants in common, a receiver should not be appointed upon the complaint and the affidavit of the plaintiff, where the only ground stated is in effect that there is hostility between the owners of the property and that confusion may result detrimental to the interests of the parties, and no reason is shown why the management of the property during the pendency of the action by the defendant will not be as satisfactory as it has been during the last twelve years during which no complaint has been made, and there is nothing to show that the defendant is not financially able to make good any deficiency.

Moreover, an order appointing a receiver in such an action should be reversed, where it appears that the defendant has offered to purchase the plaintiff's interest in the property at its appraised value, and where under said order the defendants only are enjoined and restrained from collecting the rents during the pendency of the action.

A direction to a receiver after deducting his fees and disbursements from the proceeds of the sale of the property, to apply the remainder to the deficiency that may exist in the amount directed to be paid to the plaintiff is suitable and proper in a foreclosure action, but not in an action of partition, where there is another defendant entitled to precisely the same relief and protection as the plaintiff.

APPEAL by the defendant, Minnie Kolb, from an order of the County Court of Kings county, entered in the office of the clerk of said county on the 23d day of October, 1917, appointing a receiver in a partition action.

The plaintiff, the appellant and the defendant Rudolph Laber own, as tenants in common, a lot 22 by 100 feet on Park avenue in the borough of Brooklyn, on which is a two-story wooden building rented to two tenants for a monthly rental of \$45. They derive title through their mother, who died November 27, 1898. Her husband, who had collected rents to the time of his death, died on September 5, 1905. Since that time the appellant, pursuant to an agreement with her brothers, has had the possession, personal control and management of the property and collected the income therefrom, rendering statements of her receipts and disbursements connected with the management to her brothers, and paying to each of them his respective share of the net income of the property. This action was commenced on April 30, 1917. The property has been appraised at the sum of \$4,750. There was a mortgage of \$2,000 on it when it came into the ownership of the parties, which is yet a lien thereon for that amount. The moving papers consist of the complaint and an affidavit of the plaintiff. The only ground stated for the appointment of a receiver is that "there is a strong feeling of hostility between the owners of the property in this action and in the future the plaintiff will attempt to collect the rents of the tenants who occupy said premises, and in deponent's opinion, the defendant, Minnie Kolb, will also attempt to collect the said rents and that considerable confusion detrimental to the interests of the parties herein will necessarily

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result and unless the management of the said property is put into the hands of a receiver who will duly care for the interests of the parties herein, future injury to the interests of the said parties will result either in the non-payment of the interest on the mortgage on said property or in the neglect to pay taxes, or in allowing the property to fall out of repair or in creating so much confusion in the collection of rents as to result possibly in the loss of part of some of the rents and the removal of the tenants."

The appellant asks to be allowed to account for her management of the property, and by the order of reference the referee is directed to "take and state an accounting of the rents and issues of the real property described in the complaint herein from September 5, 1905, to the date of the making of the report of the referee herein."

*Cornelius A. Baldwin* [*Jacob H. Shaffer* with him on the brief], for the appellant.

*Peter P. Smith* [*Joseph J. Reiher* with him on the brief], for the respondent.

RICH, J.:

The appointment of a receiver in an action of partition or of foreclosure is a harsh remedy, and it has been uniformly held that the property involved in such an action will not be taken from the party in possession and placed in charge of a receiver during the pendency of the action except upon clear and convincing proof that there is danger of loss or damage, and that such appointment is necessary for the protection of the parties to the action and their interests. There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established. The moving papers do not show that the appointment of a receiver is necessary to protect the rights of the parties. Not a fact is shown raising a presumption of mismanagement, possible loss or confusion. No reason is shown why the management of the property during the pendency of the action, by the appellant, will not be as proper and satisfactory as it has been during the last twelve years, during which time no complaint has been made of her management of the property.

There is nothing to show that the appellant is not financially able to make good any deficiency loss in consequence of any mismanagement of the property during the pendency of the action; on the contrary, it would seem that her unincumbered interest therein is amply sufficient to fully protect the plaintiff and his non-complaining brother. The equity in the property is less than \$3,000. In the natural course of events, a partition or sale will be had in three or four months; the rent accruing during that time cannot exceed \$180, and there is no occasion for a receiver.

There is a further reason why the order should be reversed. It appears without contradiction, from the opposing affidavit of the appellant, that in order to save the costs and expenses of a partition action she has offered to purchase the plaintiff's interest in the property on the basis of its value as appraised, or upon its appraised value to be determined by any impartial real estate expert acceptable to the plaintiff, and that she has offered to consent to its sale at public auction after properly advertising it, which is all that could possibly result in this action. Furthermore, the order seems to be directed to the interests of the plaintiff. The rights of the parties in the property are equal, and each is entitled to the same protection, yet in the order under consideration the defendants only are enjoined and restrained from collecting the rents during the pendency of the action. No restraint is placed upon the plaintiff, and the receiver is directed, after deducting his fees and disbursements from the proceeds of the sale of the property, to apply the remainder to the payment of the deficiency that may exist in the amount directed to be paid to the plaintiff in and by the judgment, a direction suitable and proper in a foreclosure action but not in one of partition where there is another defendant entitled to precisely the same relief and protection as the plaintiff, and he cannot have all of the net rents in the hands of the receiver to the exclusion of his brother equally entitled to his proportionate share.

The order of the County Court of Kings county is reversed, with ten dollars costs and disbursements, and the motion of the plaintiff for the appointment of a receiver is denied, with ten dollars costs.

JENKS, P. J., MILLS, BLACKMAR and KELLY, JJ., concurred.

Order of the County Court of Kings county reversed, with ten dollars costs and disbursements, and motion of plaintiff for the appointment of a receiver denied, with ten dollars costs.

JOHN DONOVAN, Respondent, v. KISSENA PARK CORPORATION and Others, Appellants, Impleaded with FRANCIS RAY HOWE, Defendant.

Second Department, February 9, 1918.

**Trespass — jurisdiction of equity to restrain trespass — when mandatory injunction granted — object of proceedings in civil courts.**

The unquestioned jurisdiction of equity to restrain a trespass is sparingly used and the trespass alone is insufficient to invoke it.

If a trespass consists of a structure or of materials so placed on the land that relief cannot be had by execution on a judgment in ejectment, and the injury is irreparable and cannot be compensated in damages except through multiplicity of actions, it may be restrained by mandatory injunction.

The rule that only in cases where the remedy at law is inadequate will equity interfere, has lost none of its vigor.

Although defendants have willfully and wantonly entered on plaintiff's land and taken therefrom a quantity of cement sand and filled in the excavation with stones, garbage, ashes, refuse and other materials, they should not be required by a mandatory injunction to remove the sand and refill the excavation with the same sand or sand of equal quality, where it appears that the sand removed is worth only \$625, for the value of which the plaintiff had a complete remedy at law; that compliance with the injunction will cost the defendant over \$3,000 or about the value of the lots, and that the return of the sand will not be of substantial value to the plaintiff.

The object of proceedings in the civil courts, except in cases where punitive damages are allowed, is not punishment of the defendant, but redress for the plaintiff. The remedy should, therefore, be so shaped that there is some reasonable relation between the burden placed on the defendant, and the benefit to the plaintiff.

RICH, J., dissented in part.

APPEAL by the defendants, Kissena Park Corporation and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of



Queens on the 23d day of July, 1917, upon the decision of the court after a trial at the Queens County Special Term.

The judgment determined that the defendants were trespassers upon plaintiff's land, in that they had taken therefrom about 2,500 cubic yards of cement sand and filled the excavation with stones, garbage, ashes and other materials, and granted a mandatory injunction commanding the defendants to remove said filling within three months and to refill the excavation with the sand removed therefrom, or equally good cement sand.

*Ignatius A. Scannell*, for the appellants.

*John W. Hannon* [*P. Henry Delehanty* with him on the brief], for the respondent.

BLACKMAR, J.:

The jurisdiction of equity to restrain a trespass, although unquestioned, is still sparingly used. Trespass alone does not suffice to invoke it. "The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, and where facts are not shown to bring the case within these conditions, the relief will be refused." (High Inj. [4th ed.] § 697; *Jerome v. Ross*, 7 Johns. Ch. 315.) If the trespass consists of a structure or of materials so placed on the land that relief cannot be had by execution on a judgment in ejectment, and the injury is irreparable and cannot be compensated in damages except through multiplicity of actions, it may be restrained by mandatory injunction. (*Wheelock v. Noonan*, 108 N. Y. 179; High Inj. [4th ed.] § 708; *Hahl v. Sugo*, 169 N. Y. 109; *Creely v. Bay State Brick Co.*, 103 Mass. 514.) The rule that only in cases where remedy at law is inadequate, will equity interfere, has lost none of its vigor. Whatever may have been the origin of the rule, it may now be firmly founded on undesirability of extending the use of the drastic remedy of imprisonment of the body, which is the ordinary method of enforcing a decree in equity.

The trial court has found that the defendants willfully and wantonly entered on plaintiff's land, "excavated a portion thereof below grade about 75 feet in length by 60 feet in width to an average depth of about 15 feet, and removed therefrom approximately 2,500 cubic yards of good cement

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sand and carried the same away," and that thereafter they "filled in the excavation made by them therein with quantities of rock, stone, garbage, ashes, refuse and other material." These trespassers deserve no sympathy if they suffer by the judgment, but the judgment cannot be sustained unless the facts conferring jurisdiction in equity are shown. The sand which the defendants removed was found by the trial court worth \$625. For the value of the same plaintiff has a complete remedy at law; but the decision of the court may be searched in vain for a finding that the excavation and refilling damaged the property. The only finding as to the value of the premises is that on December 11, 1908, before the trespass, they were worth \$2,162, while at the time of the trial they were worth from \$3,000 to \$3,400. The judgment is most severe. According to the finding of the court, compliance will cost the defendants over \$3,000, or about the value of the lots; and, except for the worth of the sand, for which a money judgment can compensate, it does not appear that compliance will be of substantial value to plaintiff. The object of proceedings in the civil courts, except perhaps in cases where the illogical remedy of punitive damages is permitted, is not punishment of the defendant, but redress for the plaintiff. The remedy should, therefore, be so shaped that there is some reasonable relation between the burden placed on the defendants and the benefit to plaintiff. (*Batchelor v. Hinkle*, 210 N. Y. 243.) In this case the defendants have been ordered to perform work at a cost of several thousand dollars, without, so far as can be seen from the findings of the court, conferring any benefit on the plaintiff, except one which can be compensated by a money payment.

The judgment should be reversed and new trial granted, costs to abide the final award of costs.

JENKS, P. J., MILLS and KELLY, JJ., concurred; RICH, J., concurred in the result, but is of opinion, however, that plaintiff is entitled to be reimbursed for such amount as it would cost to remove the material now upon his premises and replace it with sand of the same constituency.

Judgment reversed and new trial granted, costs to abide the final award of costs.

W. A. CASE & SON MANUFACTURING COMPANY, Appellant,  
v. YOUNG IMPROVEMENT CORPORATION and SAMUEL BRILL,  
Respondents, Impleaded with MIDWOOD PLUMBING COM-  
PANY and RICHARD L. WILLIAMS, Defendants.

Second Department, February 15, 1918.

**Liens — foreclosure of mechanic's lien by subcontractor — defense —  
willful and substantial non-performance by contractor — trial —  
reopening case — trial must follow pleadings.**

Where, in an action by a subcontractor who had supplied materials to the contractor, to foreclose a mechanic's lien, it appeared that the plaintiff also sued as assignee of the contractor, and that there had been a willful and substantial non-performance by the contractor, the complaint should be dismissed.

The court properly denied the plaintiff's application, made after the court had heard the case and had disposed of the findings and requests to find, to reopen the case so as to ask personal judgment upon notes advanced by the owner to the contractor which had not been paid.

A proceeding to foreclose mechanics' liens like other actions must follow the pleadings or at least the theory of the trial and the requests submitted.

APPEAL by the plaintiff, W. A. Case & Son Manufacturing Company, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Kings on the 15th day of May, 1917, dismissing the complaint in an action to foreclose a mechanic's lien, upon the decision of the court after a trial at the Kings County Special Term.

Plaintiff further appeals from an order entered in said clerk's office on the same day, denying its motion to submit additional requests for findings of fact and conclusions of law.

*Arleigh Pelham* [*Francis Stockton McDivitt* with him on the brief], for the appellant.

*Max Herzfeld* [*Clarence E. Mundy* with him on the brief], for the respondents.

PER CURIAM:

Plaintiff had supplied plumbing materials to the Midwood Plumbing Company, a contractor with the Young Improvement Company, which was erecting eight apartment houses.

As a subcontractor, plaintiff had to show that on October 23, 1916, when it had filed and served its notice of lien, there were moneys due the contractor, the Midwood Plumbing Company. Plaintiff also sued as assignee of the Midwood Plumbing Company, under an assignment of the Midwood Plumbing Company lien, which had been filed and assigned on September 29, 1916.

The proofs abundantly established a deliberate breach by the Midwood Company by use of bad material, and a complete abandonment of the work. The lien was bad in form. In substance there was non-performance.

It appeared that, before this breach, the defending owner had advanced the embarrassed contractor two promissory notes, each for \$500, which, after its breach, were not paid.

When the court had heard the case, and had disposed of the findings and requests to find, plaintiff asked to reopen the case so as to submit further findings in order to ask a personal judgment upon these notes, which motion the court denied.

A proceeding to foreclose mechanics' liens, like other actions, must follow the pleadings or at least the theory of the trial (*Dinkel v. Roman Catholic Church of St. Teresa*, 150 App. Div. 848) and the requests submitted. After decision is announced, a motion to reopen the cause and to submit new requests is really to inject into the trial (after it has closed) a new liability, not raised by the complaint. We see no reason to question the exercise of discretion that denied such a belated application.

The contractor's non-performance was wilful and substantial, leaving nothing on which the plaintiff's lien could attach.

The judgment and order should be affirmed, but with a single bill of costs on this appeal.

JENKS, P. J., THOMAS, MILLS, RICH and PUTNAM, JJ., concurred.

Judgment and order unanimously affirmed, but with a single bill of costs on this appeal.

FOUR HUNDRED SIXTY-ONE EIGHTH AVENUE COMPANY, INC.,  
Respondent, v. CHILDS COMPANY, Formerly Known as  
CHILDS' UNIQUE DAIRY COMPANY, Appellant.

First Department, February 1, 1918.

**Election of remedies — prosecution to judgment of one remedial right — foreclosure — lease subordinate to mortgage — tenant as party defendant — prayer that lease be cut off is election of remedies and tenant not liable for rent — order of discontinuance of foreclosure action as to tenant and vacating judgment.**

The prosecution to judgment or decree of one remedial right constitutes a conclusive election and bars a subsequent prosecution of an inconsistent remedial right.

Where in an action to foreclose a mortgage upon property incumbered by a lease subordinate to the mortgage and having a long time to run, the tenant in possession is made a party defendant and judgment cutting off his lease is prayed for, there is an irrevocable election of remedies, and where the tenant immediately upon the entry of judgment vacates the premises, both the mortgagee which became the purchaser on the sale and foreclosure and the plaintiff, its grantee, which sues for rent on the theory that the lease was not cut off by said sale, are equitably estopped from insisting that said defendant be held to its lease.

An order discontinuing a foreclosure action and vacating the judgment therein entered, as against the tenant, who never resumed possession of the leased premises, was not effective to hold him for rent.

APPEAL by the defendant, Childs Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of April, 1917, upon the decision of the court after a trial before the court without a jury.

*William A. Barber* of counsel [*Joseph Diehl Fackenthal* with him on the brief; *Barber, Watson & Gibboney*, attorneys], for the appellant.

*Frederick C. Tanner* of counsel [*Frederick C. Lawyer* with him on the brief; *Butcher, Tanner & Foster*, attorneys], for the respondent.

SCOTT, J.:

The action is for rent, and arises under peculiar conditions. The property affected consists of a store and basement of a

building in the city of New York, formerly occupied by the defendant under lease. It appears that on March 20, 1901, the then owner of the property mortgaged it to the Metropolitan Life Insurance Company, and on May 1, 1902, leased the store and basement to the defendant, or its predecessor in interest, for a term of twenty-one years. Both the mortgage and lease were duly recorded.

In December, 1913, while the foregoing lease was still outstanding and the defendant was in possession thereunder, the Metropolitan Life Insurance Company commenced an action to foreclose the above-mentioned mortgage, and made defendant a party defendant. The relief sought was in the usual form including *inter alia* a judgment that "the defendants [including the appellant] and all persons claiming under them subsequent to the commencement of this action may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises."

The plaintiff in that action had judgment as prayed for in the complaint, and a copy thereof was duly served upon the defendant. Thereupon the defendant discontinued its business, sold out its stock and fixtures, and vacated the premises. Subsequently the said plaintiff on notice to defendant and in spite of its opposition moved for an order "discontinuing the above entitled action, cancelling the said notice of pendency of said action and vacating the said judgment of foreclosure and sale" as against this defendant. This motion was denied at Special Term, but, on appeal, was granted by this court.\* The defendant has never resumed possession of the leased premises, and it is not disputed that if it should be compelled to remain a tenant thereof and to resume business therein, it would have been subjected to a heavy loss.

On the foreclosure sale the property was sold and the deed delivered to the mortgagee, the Metropolitan Life Insurance Company, which on December 31, 1915, conveyed the property to this plaintiff. The present action is based upon the theory that defendant's lease was not cut off by the sale in foreclosure, and is for the rent reserved in that lease for the period after the Metropolitan Life Insurance Company acquired the

\* See *Metropolitan Life Ins. Co. v. Hydrex Felt & Engineering Co.* (164 App. Div. 935).—[REp.]

property by the referee's deed on March 19, 1915, to and including the 1st day of October, 1916, the life insurance company having assigned to plaintiff its claim for rent during the period that it owned the property.

The claim of the plaintiff is that the effect of the order discontinuing the action and vacating the judgment as to this defendant is precisely the same as if the defendant had never been made a party to the foreclosure action, and that if it had not been made a party its lease would not have been cut off and it would still have remained a tenant of the premises and liable to pay rent reserved in the lease. If the premise be accepted we think that the conclusion would logically follow. We had occasion to consider this question in *Commonwealth Mortgage Company v. De Waltoff* (135 App. Div. 33). In that case it appeared that the defendant held a lease of an apartment in a building which had been sold in foreclosure, but said defendant had not been joined as a party to the foreclosure action. In a summary proceeding by the purchaser in foreclosure, for non-payment of rent, it was contended by defendant that the conventional relation of landlord and tenant, essential in such a summary proceeding, did not exist between himself and the purchaser on foreclosure. In holding that such conventional relation did exist we used the following language: "The purchaser at a foreclosure sale of real property acquires all the right, title and interest of the mortgagor, subject to such valid liens and incumbrances as have not been cut off by the foreclosure. He is in legal effect the grantee of the reversion and entitled to pursue any remedies that the mortgagor might have pursued if he had continued to be the owner." There is nothing inconsistent with this in *Kelley v. Osborn* (172 App. Div. 6). That was a case in which the tenant had been made a party to the foreclosure suit, but had remained in possession notwithstanding. He was held liable to pay rent, not because his lease had not been cut off by the foreclosure sale but because, by his acts after the sale, he was held to have made a new agreement with the purchaser by way of attornment. Everything decided in that case was entirely consistent with the following excerpt from the opinion in the *Commonwealth Mortgage Company* case: "If the respondent had been made a party to the fore-

closure action, his lease being subsequent and subordinate to the mortgage, would have been annulled and his continuance in possession would have been unlawful. In that case the relation of landlord and tenant would not have been created between him and the purchaser (unless a new agreement were made), and summary proceedings could not have been resorted to."

If then the defendant had never been made a party to the foreclosure action, or if the order made after judgment eliminating it as a party creates precisely the same situation as if it had not been made a party in the first instance, the judgment appealed from is right and should be affirmed. This, however, was not the effect of the order.

There is a doctrine of the law which the plaintiff seems to have entirely overlooked, but which we consider applicable to the present case. That is the doctrine of the election of remedies. When the life insurance company, plaintiff's predecessor in title, came to foreclose its mortgage it found the property incumbered by a lease, subordinate to the mortgage and having a long term to run. There was then open to it two courses of action. It might make the lessee a party defendant to the foreclosure suit, and take judgment against it. In that case the purchaser at the foreclosure sale would have acquired the property freed from the lease and the relation of landlord and tenant would not exist between such purchaser and the lessee, unless a new agreement were made. Or it might have omitted to make the lessee a party defendant to the foreclosure suit, in which case the lease would not have been cut off; the purchaser at the foreclosure sale would have acquired the property subject to the lease, and the relation of landlord and tenant would have existed between such purchaser and the lessee. Thus the life insurance company, having full knowledge of all the facts, had at its command two coexistent remedies which were not analogous, consistent or concurrent. One was to sell the property subject to the lease, the other to sell it freed from the lease. Under such circumstances it is well settled that any decisive act of a party looking to the adoption of one remedy rather than the other is determinative of his election to adopt that remedy and is irrevocable. So, as has been frequently held, the prosecution



of one remedial right to judgment or decree is a decisive act which constitutes a conclusive election, and bars a subsequent prosecution of an inconsistent remedial right. In *Conrow v. Little* (115 N. Y. 387) the Court of Appeals speaking of the plaintiffs' election in that case to affirm or avoid a contract said: "They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract." And the same court said in *Terry v. Munger* (121 N. Y. 161): "When it becomes necessary to choose between inconsistent rights and remedies, the election will be final and cannot be reconsidered even where no injury has been done by the choice, or would result from setting it aside."

These well-settled rules are exactly applicable to the case at bar. When the life insurance company elected to so frame its foreclosure action as to cut off defendant's lease, and prosecuted the suit to judgment it made a decisive and irrevocable election, and neither it, nor its assignee, the present plaintiff, could thereafter insist that the lease and the obligations of the lessee survived the sale. The order authorizing the discontinuance of the action against this defendant cannot be considered as an adjudication that no such election had been made, or, if made, that it could be reconsidered. No such question was involved. All that can be said of that order is that it recognized the right of the plaintiff's assignor to frame its action as it saw fit, but it certainly was not intended to affect the right of the defendant, then already vested, to hold the mortgagee to its election.

We are also of the opinion that the plaintiff in the foreclosure action, and the present plaintiff, its grantee, are equitably estopped to now insist that defendant be held to its lease. After the foreclosure action had been brought and judgment had been asked canceling, *inter alia*, defendant's lease, and judgment had actually been entered to that effect, defendant was justified in assuming that its lease was to be cut off, and in moving out of the premises at considerable cost. It thereby changed its position to its detriment, in reliance upon the positive acts of the plaintiff in the foreclosure action. It was not bound, as between itself and the

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insurance company, or the purchaser at the foreclosure sale, to remain in possession at the risk of being forcibly and summarily ejected.

It follows that the judgment appealed from must be reversed and the complaint dismissed, with costs to the appellant in this court and the court below.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Judgment reversed, with costs, and complaint dismissed, with costs. Order to be settled on notice.

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In the Matter of the Judicial Settlement of the Account of  
ENOCH G. MEGRUE, as Executor, etc., of JOSEPH RUST  
MEGRUE, Deceased.

MINNIE MEGRUE, Respondent; ENOCH G. MEGRUE, as  
Executor of and Trustee under the Last Will and Testament  
of JOSEPH RUST MEGRUE, Deceased.

First Department, February 1, 1918.

**Will — testamentary trust — when corporate stock constitutes a  
part of corpus of trust and is not income.**

At the creation of a testamentary trust by which testator directed that certain shares of the stock of an oil company should be held by his son in trust for testator's widow, all of the stock of two subsidiary companies constituted a part of the capital of the oil company and was delivered by it to its stockholders including the testamentary trustee. Subsequently the pipe line property of the subsidiary companies was sold for the stock of other companies and it was delivered to the stockholders of the subsidiary companies. *Held*, that such of said stock as was received by the testamentary trustee was principal belonging to the corpus of the trust fund and not payable to testator's widow.

APPEAL by Enoch G. Megrue, as executor and trustee, from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 14th day of September, 1917, confirming the report of a referee.

*Treadwell Cleveland*, for the appellant.

*John M. Gardner*, for the respondent.

SCOTT, J.:

The appellant, trustee under the last will and testament of Joseph Rust Megrue, deceased, appeals from a decree of the Surrogate's Court, by which the said appellant, as trustee of a trust created by the will of said Joseph Rust Megrue, deceased, was ordered to deliver to the petitioner, the beneficiary for her life of said trust, certain stocks of the Ohio Oil Company and of the Prairie Oil and Gas Company, received by said trustee in 1915 from the Standard Oil Company of New Jersey. The controversy between the parties is as to whether such stocks constitute part of the capital of the trust fund, or should be considered and distributed as income. The facts are not in dispute and so far as material are as follows: The testator, Joseph Rust Megrue, died on October 8, 1910, possessed of 300 shares of the stock of the Standard Oil Company of New Jersey, 100 shares of which he directed in his will should be held by his son, Enoch G. Megrue, in trust for his widow, Minnie Megrue, the petitioner herein.

On September 1, 1911, in accordance with the decision of the United States Supreme Court in the Standard Oil case, the Standard Oil Company of New Jersey distributed to its stockholders stock in several different companies spoken of as subsidiaries, among which subsidiary companies were the Prairie Oil and Gas Company and the Ohio Oil Company.

The trustee, who under the said will then held, and still holds, these one hundred shares of stock of the Standard Oil Company of New Jersey, became, on September 1, 1911, a holder as trustee for the petitioner, under this distribution by the Standard Oil Company of New Jersey, of eighteen and a fraction shares of the stock of the said Prairie Oil and Gas Company and of sixty-one and a fraction shares of the said Ohio Oil Company.

The trustee still holds these shares of the Prairie Oil and Gas Company and of the Ohio Oil Company as part of the principal of the said trust.

In June, 1914, the United States Supreme Court handed down its decision in what are called the *Pipe Line Cases* (234 U. S. 559), to which litigation both the Prairie Oil and Gas Company and the Ohio Oil Company were parties.

By reason of this decision neither of these companies could

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longer engage in the pipe line business. Each company accordingly resolved that that part of its assets which consisted of pipe line property be disposed of to another company to be organized, and that the stock of such new company be distributed *pro rata* to its own stockholders. This action, so resolved upon by the respective companies, was carried out. The pipe line property of the Prairie Oil and Gas Company was sold to the Prairie Pipe Line Company for the whole of its stock; and the pipe line property of the Ohio Oil Company was sold to the Illinois Pipe Line Company for the whole of its stock; and the stocks so received of such new companies were distributed among the stockholders of the companies which sold such pipe line properties.

The sale by the Prairie Oil and Gas Company of its pipe line property to the Prairie Pipe Line Company, and the distribution by the Prairie Oil and Gas Company of the stock which it received as the consideration for such pipe line property was made under a resolution adopted by the stockholders of the former company on December 8, 1914, the sale being made on February 1, 1915. The sale of the Ohio Oil Company of its pipe line property to the Illinois Pipe Line Company, and the distribution by the Ohio Oil Company of the stock of the Illinois Pipe Line Company which it received for such pipe line property was made under a resolution adopted by the Ohio Oil Company on December 21, 1914, the sale being made on January 1, 1915.

Accordingly, in January and February, 1915, the trustee, Enoch G. Megrue, received under these distributions from the Prairie Oil and Gas Company twenty-seven and a fraction shares of the stock of the Prairie Pipe Line Company, and from the Ohio Oil Company twenty and a fraction shares of stock of the Illinois Pipe Line Company.

The *cestui que trust* now claims these twenty-seven and a fraction of the shares of the Prairie Pipe Line Company stock and twenty and a fraction shares of the Illinois Pipe Line Company stock as stock dividends or income. The trustee claims that all such shares belong to him as such trustee as part of the trust fund, and that they are in no respect income or profits of the trust fund to which the petitioner is entitled.

The question to be determined is whether such shares are

income and as such belong to the *cestui que trust*, or principal and as such belong to the corpus of the trust.

Upon these facts the question at issue must be determined in favor of the appellant for the reasons very fully and clearly stated by Mr. Justice SHEARN in his opinion in *United States Trust Co. v. Heye* (181 App. Div. 544), decided herewith.

When the trust fund was created the Standard Oil Company of New Jersey owned all the capital stock of the Ohio Oil Company and the Prairie Oil and Gas Company, and these constituted a part of the property or capital of said Standard Oil Company. The 100 shares of the latter company, which constituted the trust fund, represented and stood for a proportionate part of the capital and property of said Standard Oil Company and consequently represented an equal proportionate part of the capital of the trust fund. When the Standard Oil Company found it necessary to divest itself of the ownership of the subsidiary companies, it withdrew from its capital assets the stock of said subsidiary companies, and to this extent depleted its capital. The method it adopted for so divesting itself was to distribute the stock of the subsidiaries among its own stockholders, thus making good to them the depletion of its own capital caused by parting with the subsidiary shares. The corpus of the trust fund was not changed in any way. Before the distribution the shares of the Standard Oil Company stock held by the trustee represented a proportionate part of all the assets of that company, including the stock and assets of the subsidiary companies. After the distribution the trust fund held precisely the same interest, except that, so far as concerned the subsidiary companies, it held their stock directly and not by representation through the stock of the Standard Oil Company. To now turn over to the life beneficiary the stocks which have taken the place of the stocks of the subsidiary companies, as the decree appealed from proposes to do, would amount to handing over to her, as income, that which at the time the trust fund was set up constituted a part of the principal of that fund. As was said in *Matter of Osborne* (209 N. Y. 474): "It is not alone the capital of the corporation that should be preserved, but the capital of the trust fund \* \* \*. The surplus of the corporation existing

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at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation."

It is, therefore, quite immaterial that the stock of the subsidiary companies may have been acquired by the Standard Oil Company out of surplus earnings which accrued prior to the creation of the trust fund. The controlling fact is that it had been acquired before the trust fund was set up, and so constituted a part of the capital of the trust fund, as represented by the stock of the Standard Oil Company when the trust fund was actually set up.

*Hazzard v. Philips* (173 App. Div. 425), upon which respondent places her chief reliance, even if we were prepared to adopt its reasoning, is easily distinguishable from the case at bar. It follows that the decree appealed from should be reversed, with costs to the trustee payable out of the estate. Inasmuch as the question involved is one which called for judicial determination, and was sufficiently doubtful to acquit the petitioner of any charge of having acted unreasonably, we consider that the expense of the reference ordered by the surrogate should be borne by the trust estate. The award of costs and allowance to the petitioner must, however, be reversed.

CLARKE, P. J., SMITH, PAGE and SHEARN, JJ., concurred.

Decree reversed, with costs to trustee payable out of the estate. Expense of reference to be borne by the trust estate. Award of costs and allowance to petitioner reversed. Order to be settled on notice.

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JOSEPH F. KNIGHT, Appellant, v. EMMONS BROTHERS  
COMPANY, Respondent.

First Department, February 1, 1918.

**Pleading — complaint alleging refusal to perform contract — when  
order sustaining demurrer will be reversed.**

Where upon its face a complaint alleging defendant's refusal to perform a certain contract creating plaintiff sole selling agent for defendant's entire production of a certain kind of hats states a complete cause of

action, an order sustaining a demurrer on the assumption that the defendant's refusal might have been based on its determination to discontinue the manufacture of hats of the kind specified will be reversed. It was not for plaintiff to assign a reason for defendant's breach of the contract; that was a matter for defendant to plead.

APPEAL by the plaintiff, Joseph F. Knight, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of May, 1917, granting defendant's motion for judgment on the pleadings consisting of a complaint and the demurrer thereto.

*George W. Files*, for the appellant.

*Walter L. Post* of counsel [*Charles M. Russell*, attorney], for the respondent.

SCOTT, J.:

The complaint alleges a refusal on the part of defendant to perform a certain contract, and asks damages for the breach. The contract, which is annexed to the complaint, creates plaintiff sole selling agent for defendant's entire production of men's and boys' fur and wool hats for a certain specified territory, for which plaintiff was to be paid a stipulated commission. Upon its face the complaint states a complete cause of action, and is not obnoxious to a demurrer, which seems to have been sustained because it was assumed that defendant's refusal might have been based upon its determination to discontinue altogether the manufacture of hats of the kind specified. No such fact is suggested by the complaint or demurrer. All we find is a complaint setting forth a contract and its breach. It was no part of plaintiff's duty to assign a reason for defendant's breach. That was a matter for defendant to plead.

If the defendant had answered and had set up as a reason for its action the discontinuance of manufacture there would have been presented a sufficient excuse. The contract, as pleaded, did not bind defendant to manufacture any particular number of hats, or any at all. All that it did undertake was that plaintiff should be the selling agent for such hats, of the kind specified, as defendant might manufacture, to wit,

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of defendant's "entire production." If defendant elected to discontinue the manufacture so that there should be no production, there would be nothing for plaintiff to sell. But, as has been said, this question is not raised by the complaint and demurrer.

It follows that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs, with leave to defendant to withdraw the demurrer and answer upon payment of said costs within twenty days.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to defendant to withdraw demurrer and to answer on payment of costs.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
JOSEPH SHENK and WILLIAM GLASSER, Appellants.

First Department, February 1, 1918.

**Crime — public nuisance — indictment for maintaining a disorderly house — when evidence justifies a conviction — instructions to employes as to reporting improper use of premises properly excluded — duty of trial judge to avoid creation of prejudice in favor of defendants — invading province of jury — mistrial — when refusal to accept is waiver of right to new trial.**

Upon the trial of an indictment for maintaining a public nuisance, to wit, a disorderly house, testimony that an apartment house leased by one of the defendants, some of the apartments being leased by his codefendant, was openly frequented by prostitutes, who with their companions quarreled, used improper language and made indecent exposures before uncurtained windows, all of which both defendants had knowledge and willfully permitted the house to be so maintained, justifies a conviction of the crime charged.

Where upon the trial the sole questions were the actual use to which the house was put, and the actual knowledge thereof of defendants, evidence as to instructions given to the janitor, elevatorman and hallman, to report any improper use of the apartments, was properly excluded.

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Permitting a witness to designate the action of one of the defendants in tacking a paper upon the door of one of the apartments as a "cover," the only inference which was within the province of the jury, could not be considered prejudicial to the defendant.

It is the duty of a trial judge to so conduct a criminal trial as to avoid if possible the creation of any undue prejudice in favor of the defendants, as against policemen, the necessary witnesses for the prosecution.

The province of the jury was invaded where the trial judge asked more than twelve hundred questions indicating his bias, both sides being represented by able counsel.

But where the court admonished a juror for misconduct and at once offered counsel for the defendant a mistrial, the refusal thereof constitutes a waiver of the right to a new trial though sought on other and different grounds.

APPEAL by the defendants, Joseph Shenk and another, from a judgment of the Court of General Sessions of the Peace in and for the County of New York, Part VI, entered in the office of the clerk of said court on the 29th day of May, 1916, convicting them of a misdemeanor in maintaining a public nuisance, to wit, a disorderly house.

*William M. K. Olcott* of counsel [*Theodore B. Chancellor, Isidore D. Morrison* and *Jacob R. Schiff* with him on the brief; *Olcott, Gruber, Bonyng & McManus*, attorneys], for the appellants.

*Robert S. Johnstone* of counsel [*Edward Swann, District Attorney*], for the respondent.

SMITH, J.:

The defendants were convicted under the third count of the indictment, which charges them with the crime of maintaining a public nuisance, in that they did unlawfully keep and maintain a certain common, ill-governed house, being the same house mentioned and described in the first count of the indictment, and in that house certain persons, both men and women, of evil name and fame, did frequent and come together at unlawful times, as well in the night as in the day, and then and at all times did there remain "tippling, drinking, gaming, cursing, swearing, quarreling, rioting, whoring, making great noise, and otherwise misbehaving themselves, unlawfully and wilfully [the defendants] did permit and suffer to

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the great annoyance, injury and danger to the comfort and repose of a great number of persons, good citizens of our State, there residing, and passing and repassing, to the great offense of public decency and to the common nuisance of the said citizens, against the form of the statute in such case made and provided."

The house is situate at 62 West One Hundred and Seventh street in the borough of Manhattan. It is an apartment house, comprising various apartments, the entire house being leased by the defendant Shenk. A large number, if not all, of the apartments were subleased by the defendant Glasser.

It is not my object to specify in detail the evidence of the unlawful character of the house. It is sufficient to say that we have carefully examined the evidence and we are well satisfied with the conclusion of the jury that this house was frequented by prostitutes, with their companions, openly; that there was much disorder, quarreling and improper language used, with open windows, and indecent exposures before windows uncurtained, at different times of the day and night. We are satisfied also with the finding of the jury that both defendants had knowledge of the character of the house and its inmates, and willfully permitted the house to be so maintained, so that it became a public nuisance as defined by law.

The defendant Shenk had been arrested a year before upon a similar charge, at which time four women residents of his house were arrested and convicted as public prostitutes. The prosecution of the defendant Shenk was not pressed, however. The witness Jones, at the time of the arrest of the defendant Shenk, told him that there had been no improvement in the premises, and that the place was filled up again with prostitutes and pimps and other disorderly characters, and that they were going to hold him responsible to clean that building out, and that he had better put them out of there. Shenk replied: "I will put nobody out." The witness Sutter then told the defendant Shenk that he had better get the pimps and prostitutes out of there, to which Shenk made no reply. This also was sworn to by the witness Sutter.

These two witnesses were both police officers. The jury had the right to believe their testimony. Shenk for a part

of the time had an apartment in the building, and Glasser lived next door and was there every night. The use of the house, therefore, must have been known to both of these defendants. The conviction must stand, unless in the course of the trial the court committed some error which in the interest of justice calls for a new trial of the action.

One of the errors claimed is the refusal of the court to allow defendants to show by the janitor of the building that the janitor had received instructions concerning the conduct of the house and what these instructions were. Similar questions were put to the elevatorman and the hallman Bowen, and were also excluded, and it was claimed on the argument that the defendants desired to show by these men that these servants were instructed to notify Shenk of any improper use of the apartments. There was no question as to whether the defendants used reasonable care in the conduct of the building or as to what effort they made to ascertain its use. The sole questions were, *first*, as to the actual use; and *secondly*, as to the actual knowledge of the defendants as to that use. If the defendants had been allowed to show any instruction to the servants to report to the defendants any improper use, with the finding upon abundant evidence that the apartments were improperly used, such evidence would have shown the probability of such information having been conveyed to the defendants, which would harm the defendants rather than help them. No tenants were removed by defendants except after conviction as prostitutes. If, as has been found, the defendants had knowledge of an improper use of the premises, instructions to their servants can neither mitigate nor atone for their unlawful conduct, nor can it avail the defendants if they gave instructions to their servants not to permit the improper use of the premises if, to their knowledge, these instructions, if given, were never carried out.

One witness was improperly allowed to designate the action of the defendant Shenk as a "cover," when Shenk tacked a paper upon the door of one of the apartments. This was the inference that the district attorney sought to draw from the act, and was apparently only an inference which it was within the province of the jury to draw, and it is hardly possible that this apparent inference could have prejudiced

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the defendants with the jury. There are other exceptions urged to the admission and exclusion of evidence, none of which deserve serious consideration, as they are all trifling in their character.

There are further objections made to the charge of the court, but a careful reading of the charge would indicate that they are entirely without substantial foundation. It appears all through the trial that the defendants were seeking to arouse a prejudice against the policemen's evidence, upon which such convictions largely must rest. One question, for example, asked of a policeman witness was whether he was a member of "the whore house squad." It was not only the right but the duty of the trial judge to so conduct the trial as to avoid, if possible, the creation of any undue prejudice in favor of the defendants as against policemen, the necessary witnesses for the People. While in this endeavor the trial court may have gone further than was necessary in his commendation of the policemen witnesses and of the police force of the city of New York, and of their right to strive for advancement in the service, nevertheless he was careful to caution the jury that they had no right to commit perjury for any reason or to be corrupt for any reason, or to do any wrongful act.

The trial court repeatedly in his charge instructed the jurors that they were the sole judges of all questions of fact and of the credibility of witnesses, and that the defendants should be given the full benefit of any reasonable doubt. We are unable to find in the charge any legal error or any attempt to influence the jury to give any undue consideration to the testimony of the witnesses for the People or to create any undue prejudice against the defendants or their witnesses.

The burden of the appellants' complaint upon this appeal, however, is that the trial was so conducted by the court, both by his interference with the trial in asking many questions, and by the nature of the questions asked and his characterization of the evidence of the witnesses, that it amounted to a usurpation by the court of the functions of the jury, to the material prejudice of the defendants in the action. While the court in its charge to the jury stated that he had not intended to indicate in any way his opinion upon any question of fact

in the case, or as to the credibility of any witnesses, the record indicates that whether intentional or not, the conduct of the trial is subject to grave criticism. It was stated by counsel and not contradicted that the trial judge himself asked over 1,200 questions, in an action wherein both the People and the defendants were represented by able counsel. An interference to this extent by the court with the trial of a case was clearly against the rules of proper procedure and fair play, and could not have existed without a clear indication to the jury as to the attitude taken by the court, both in respect to the merits of the case and to the credibility of the witnesses. Moreover, the questions put to the witnesses and the comments made upon their testimony by the court did constitute in this case an unwarrantable usurpation of the province of the jury. They indicate the mind and bias of the trial judge in no doubtful manner, and no disavowal of such intention made in the charge could disabuse the minds of the jurors of the impression created by such action. We are of the opinion that the defendants have just cause to claim a mistrial of this case from the conduct of the trial judge, if it were not for a fact that we deem to be a waiver upon the part of the defendants' counsel of the right to a new trial upon such ground. Near the end of the trial, the court, about to take a recess, admonished the twelfth juror that he was not to talk as much as he did, and that he was not to make up his mind until the evidence was all in. Of this admonition no criticism can be made, as it was the right as well as the duty of the trial judge to admonish the juror if he was misbehaving. After such admonition, however, the court said to the defendants' counsel: "The Court: Now, if you want a mistrial, Mr. Levy, you can have it. I was forced by the conduct of this man to refer to him not only to-day, but several times. If you want to go to the jury, all right. If not, I will give you a mistrial. Mr. Levy: That places counsel in a very embarrassing situation. The Court: You want a mistrial, or you don't? Mr. Levy: Certainly not, sir. I can trust this jury." It is immaterial upon what ground the court was willing to give the defendants a new trial. Instead of taking a new trial the defendants, through their counsel, chose to proceed with the trial. It has been often held that a party cannot experi-

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ment with the court. The defendants cannot refuse a new trial offered and take their chances with the jury, as they did, and thereafter, upon an adverse verdict, claim error for which they might have taken a new trial at that time. Defendants' counsel could not at that time have deemed his case to have been seriously prejudiced by the trial judge or he would have accepted the opportunity for a retrial. It is not improbable that the defendants deemed that their case was stronger with the jury by reason of the adverse attitude of the trial judge during the trial. But whatever their reason for refusing to accept the new trial thus offered, after they had taken their chance with the jury and been beaten, justice does not require the granting of a new trial at this time by reason of any hostile attitude of the court, a remedy for which was thus offered them and refused.

After this opportunity so given at a time when the trial was nearly finished, there was nothing in the conduct of the trial which would prejudice the defendants to any greater extent and for which this judgment must be set aside. The jury was fully instructed that the defendants should be given the benefit of all reasonable doubts, and that the determination of the facts was entirely within their province and not within the province of the court and should be determined without any reference to any impression which may have been created in their minds by any act of the court. The guilt of the defendants was so clearly shown that the jury could hardly have reached a different conclusion from the one expressed by their verdict, and I am unable to find any substantial error for which the defendants should be given another chance with another jury.

The judgment of conviction should, therefore, be affirmed.

CLARKE, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Judgment affirmed.

NATHAN NANES, Respondent, v. PECK & MACK Co., Appellant.

First Department, February 21, 1918.

**Sale — action for balance due for goods sold and delivered — defense — fraudulent misrepresentation by seller as to cost.**

A representation that goods offered for sale had cost the seller a certain amount is a representation of fact and not an expression of opinion and if it was false and was fraudulently made and relied upon by the buyer it furnishes a basis for a counterclaim in an action by the seller to recover a balance alleged to be due.

APPEAL by the defendant, Peck & Mack Co., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of October, 1917, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 29th day of October, 1917, denying defendant's motion for a new trial made upon the minutes.

The judgment, among other things, dismissed defendant's counterclaim.

*Franklin Bien*, for the appellant.

*Leon Sanders*, for the respondent.

DOWLING, J.:

This action was brought to recover a balance claimed to be due for goods sold and delivered. The defendant interposed an answer containing a counterclaim for \$4,588.99, based on allegations that plaintiff had falsely represented to defendant, in order to induce it to purchase the goods, wares and merchandise in question in bulk, at the price of \$6,000, (a) that said goods had cost plaintiff not less than \$8,500, and (b) that the market value of said goods was not less than \$8,500. Defendant claims that it relied upon said representations and, believing them to be true, bought the goods at the price of \$6,000, paying \$3,000 on account thereof, whereas in fact said representations were untrue and were made to defraud defendant, and in fact the goods in question (a) had

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not cost plaintiff the sum of \$8,500, but only \$3,911.01, and (b) were not of the fair market value of \$8,500. These misrepresentations defendant did not discover until after it had made the payment on account. The case has been treated as one for a misrepresentation as to market value only, and as, therefore, coming within the class of cases of so-called "dealers' talk," where it has been held no cause of action for deceit existed. But in so doing the allegation of a misrepresentation as to the cost to plaintiff of the goods in question has been entirely overlooked. The representation that the goods offered for sale in bulk had cost plaintiff \$8,500 was a representation of a fact, not an expression of an opinion, and if it was false, fraudulently made and relied upon by defendant, it would furnish a basis for recovery under the allegations of defendant's counterclaim. The findings of the jury, by direction that plaintiff was entitled to recover the balance upon the purchase price of the goods in question, is reversed, as is the dismissal of the counterclaim.

The judgment and order appealed from will be reversed and a new trial ordered, with costs to appellant to abide the event.

SCOTT, LAUGHLIN, SMITH and DAVIS, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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FREDERICK P. GILSON, Appellant, v. LEONORA L. AIRY, also  
Known as LOTTIE GILSON, Respondent.

First Department, February 21, 1918.

**Husband and wife — divorce — validity in this State of foreign  
decree of divorce — annulment of marriage.**

A decree of divorce granted by a Missouri court to the husband against the wife who was a resident of this State, will not be recognized as valid by our courts, where the first and only matrimonial domicile was in this State where the parties both resided at the time of their marriage, and the defendant did not subject herself to the jurisdiction of the Missouri court by appearing or answering in the action.



Hence, such a decree of divorce is no defense in an action to secure the annulment of a second marriage contracted by the defendant therein upon the ground that she had a former husband still living.

APPEAL by the plaintiff, Frederick P. Gilson, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 15th day of December, 1917, dismissing the complaint on the merits upon the decision of the court after a trial at the New York Special Term.

*Paul M. Crandell*, for the appellant.

*Harry Saks Hechheimer*, for the respondent.

DOWLING, J.:

Plaintiff commenced this action to secure the annulment of his marriage to the defendant, upon the ground that at the time of entering into said marriage the defendant had a former husband still living.

The record shows that defendant was married to Orin W. Airy at Ossining, in the State of New York, on July 10, 1909. Defendant then resided at 751 Putnam avenue in the borough of Brooklyn, city of New York, and had resided there for several years. Defendant's recollection is, that Airy was then residing with an aunt of his in New York, but at what address she was unable to tell. After the marriage, Airy and defendant lived together for some three weeks, as husband and wife, at a boarding house in Caton avenue, borough of Brooklyn, city of New York. Then he was called to Maryville, Mo., by a telegram stating that his mother was very ill, and his wife refused to go with him. The parties never lived together thereafter, nor did they ever meet again, after their separation about August 1, 1909. In July, 1910, Airy commenced an action in the Circuit Court of Jackson county, State of Missouri, to obtain a decree of divorce upon the ground of desertion. In his petition Airy set forth that for more than a year preceding the filing thereof he had been a resident of the State of Missouri. He averred that his wife deserted him on July 20, 1909, and by affidavit set forth that she was a non-resident of the State of Missouri, whereupon he obtained an order for her service without the State as prescribed by

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chapter 21, article IV, Revised Statutes of Missouri. (R. S. Mo. 1909, chap. 21, art. 4, § 1770 *et seq.*, vol. 1, pp. 625-629.) By virtue thereof, service of the petition and summons in said action was made on defendant herein, personally, on February 10, 1911, at her home 751 Putnam avenue, in the borough of Brooklyn, city of New York. Defendant did not appear or answer in the Missouri action, and thereupon Airy obtained a decree of absolute divorce from defendant, granted by said Circuit Court of Jackson county, State of Missouri, on April 7, 1911. On July 10, 1911, defendant was married to the plaintiff herein in the borough of Manhattan, city of New York, whereof defendant was then a resident. Plaintiff then resided at Jersey City, in the State of New Jersey. Plaintiff and defendant lived together as husband and wife until March 30, 1917, when the latter left the former's home. This action was commenced June 30, 1917. All the foregoing facts are proven without contradiction. It thus appears that when defendant married Airy both resided in the State of New York. Their first and only matrimonial domicile was the State of New York. When Airy went to Missouri defendant remained in the State of New York, and she has never lived in the State of Missouri, nor even been within that State. The Missouri court which granted the decree of divorce to Airy never obtained jurisdiction of this defendant, for Missouri had never been the matrimonial domicile of Airy and defendant, nor the domicile at any time of defendant (both of which domiciles were within this State), nor had service been made in that State, nor had defendant (still a resident of this State) subjected herself voluntarily to its jurisdiction by appearing or answering in the action. It follows that the decree of divorce in favor of Airy will not be recognized as valid by the courts of this State. (*Haddock v. Haddock*, 201 U. S. 562; *O'Dea v. O'Dea*, 101 N. Y. 23; *Olmsted v. Olmsted*, 190 id. 458; *Williams v. Williams*, 130 id. 193; *Atherton v. Atherton*, 155 id. 129; 181 U. S. 155; *Ransom v. Ransom*, 54 Misc. Rep. 410; *affd.*, 125 App. Div. 915; *Berney v. Adriance*, 157 id. 628.) Therefore, when defendant contracted her marriage with plaintiff, she still had a former husband (Airy) living from whom she was never legally divorced and plaintiff is entitled to the judgment which he seeks, declaring the marriage between him

and defendant void and annulling the same. (Code Civ. Proc. § 1743; Dom. Rel. Law [Consol. Laws, chap. 14; Laws of 1909, chap. 19], § 6.)\*

The judgment appealed from will be reversed, with costs to appellant, and judgment directed in favor of plaintiff accordingly. The following findings of fact are hereby reversed: "3" (in so far as it finds that plaintiff and defendant resided and cohabited together in said city of New York as husband and wife); "5," "6," "7" and "8." Also the conclusions of law are reversed numbered "1," "2" and "3." The following findings of fact proposed by plaintiff are found: "3," "4," "5," "11" (in so far as trial judge refused to find same), "12" and "14;" also the proposed conclusions of law numbered "1," "2" and "3."

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Judgment reversed, with costs, and judgment ordered for plaintiff as stated in opinion. Order to be settled on notice.

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EMIL GROSSMAN MANUFACTURING Co., INC., Appellant,  
Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY,  
Respondent, Appellant, Impleaded with MICHIGAN CENTRAL  
RAILROAD COMPANY, Defendant.

First Department, February 21, 1918.

**Carriers — evidence not establishing agreement to deliver goods within certain time — proof improperly received affords no basis for amendment of pleadings to conform thereto — agreement with shipper to expedite shipment at regular rates in violation of Interstate Commerce Act — liability of carrier under bill of lading for damage to goods in transit — consequential damage.**

In an action by a shipper against a carrier for failure of the latter to deliver goods shipped within a certain period, evidence held insufficient to sustain a finding that there was an agreement between the plaintiff and the defendant by which the latter agreed to deliver plaintiff's goods not later than a certain date.

A complaint, alleging an agreement by the defendant to deliver a shipment by the plaintiff not later than the fourth morning following receipt thereof,

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\* Since amd. by Laws of 1915, chap. 266. — [R&P.]

will not be amended at the trial so as to provide that the agreement was to deliver "at all events with reasonable dispatch and within a reasonable time," in order to conform the pleadings to proof which had been improperly received under objection and exception.

An agreement with a particular shipper to expedite a shipment at regular rates, where no rate has been published for expediting, is a discrimination and a violation of the Interstate Commerce Act, and relief thereon will be denied.

The rights of a shipper and a connecting carrier are to be measured solely by the bill of lading issued by the initial carrier.

Under a bill of lading providing that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment, the shipper is entitled only to the actual damage to its property, and not to any consequential damage arising either from its delayed delivery or from an inability to use it for any period of time because of its damaged condition.

CROSS-APPEALS by the plaintiff, Emil Grossman Manufacturing Co., Inc., and by the defendant, New York Central Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of June, 1916, upon the verdict of a jury. The plaintiff further appeals from an order entered in said clerk's office on the 20th day of June, 1916, denying its motion for a new trial made upon the minutes.

*David L. Podell* of counsel [*Jacob Podell* with him on the brief; *Harry S. Wallenstein*, attorney], for the appellant, respondent.

*William Mann* of counsel [*Alex. S. Lyman*, attorney], for the respondent, appellant.

DOWLING, J.:

This action was originally brought against the New York Central and Hudson River Railroad Company (predecessor of the defendant the New York Central Railroad Company) and the Michigan Central Railroad Company, hereinafter respectively called the New York Central and the Michigan Central. The complaint set forth three causes of action against both defendants. It was alleged therein that on or about August 25, 1913, the plaintiff entered into an agreement with the defendant New York Central whereby the latter agreed to ship certain machinery belonging to the

plaintiff from its factory in Detroit, Mich., to its factory in the Bush Terminal Building, borough of Brooklyn, city of New York, which shipment was to be made over the lines operated and controlled by the defendants herein; that the New York Central through its duly authorized agent undertook, promised and agreed with plaintiff to deliver said machinery safely to plaintiff at its place of business aforesaid in the city of New York upon the fourth morning following the receipt thereof by the defendants at the city of Detroit; that the defendants were informed that the machinery so to be shipped was especially adapted for certain work relating to the manufacture of automobile accessories and was to be used by plaintiff in its business in New York and that its factory therein could not be operated without the use of the said machinery; that said machinery was delivered on or about September 6, 1913, in perfect condition, by plaintiff to defendant Michigan Central which issued receipts therefor, whereby it agreed to deliver the same to plaintiff at the Bush Terminal Building aforesaid, said shipment to be made over the New York Central lines. The first cause of action then avers that either or both of said defendants transported said machinery in a careless and negligent manner, allowing same to become damaged and broken, and as a result part of the shipment arrived at the Bush Terminal Building in a damaged condition, to plaintiff's damage in the sum of \$63.71. The second cause of action avers (in addition to the main allegations) that the New York Central had stipulated and agreed with plaintiff to deliver said shipment not later than the fourth morning after the receipt thereof by defendants at the city of Buffalo [so in original complaint], and plaintiff, relying upon said representations, had made all arrangements to resume the work of its factory at that time, and as a result plaintiff was unable to operate its factory during eleven days time when the machinery was *en route*, and thereby suffered loss and damage for seven days over and above the agreed time of delivery, to its damage in the sum of \$1,155. The third cause of action (after realleging the main facts set forth in the other two causes of action) contains the further averment that on or about September 17, 1913, the machinery in question was received by plaintiff at its factory in the

borough of Brooklyn, but damaged and totally unfit for use, by reason whereof plaintiff was required to employ mechanics to repair it, which repairs were not fully completed until September 27, 1913, during which time plaintiff was unable to use the machinery to its loss in the sum of \$840.

The appellant acknowledged its liability in the sum of \$63.71, being the claim set forth in the first cause of action, for the reason that the proof showed that the machinery arrived at Suspension Bridge in good condition, where it passed into its custody and the appellant was unable to show how or where it was damaged, if not upon its own lines between Buffalo and New York. Upon the second cause of action the jury found in favor of the plaintiff in the sum of \$156. On the third cause of action the jury found in favor of the defendant. Upon the trial the plaintiff consented to a dismissal as against the Michigan Central, conceding it had established no cause of action against it. The plaintiff now appeals from the finding of the jury on the third cause of action in favor of the defendant and also from the refusal to allow it larger damages upon the second cause of action than the sum of \$156. The defendant appeals from the verdict of the jury against it on the second cause of action in the sum of \$156.

The plaintiff endeavors to establish its claim of a special agreement by the New York Central to forward the goods in question from Detroit to New York and to have them arrive there not later than the fourth morning after they were delivered to it at Detroit, by the testimony of Emil Grossman, president of the plaintiff, who claims that at a meeting between him and Thomas Newman, soliciting freight agent of the New York Central, held at the plaintiff's office on either August twenty-fifth or twenty-sixth, Grossman told Newman that the plaintiff was about to remove its entire factory and abandon manufacturing in Detroit, and as the material to be moved would occupy at least four cars and as delay would involve great hardship and expense, the plaintiff desired to send its material by the railroad that would deliver it in the shortest time possible. Grossman said he tried to have Newman agree to get the freight to New York in two days, but while the latter admitted it could be done, he said he would not undertake to do it, and finally said it would be done in three days or

"at least on the fourth morning." Grossman said that he then asked Newman to put the agreement in writing. This conversation is denied by Newman, who testified that no agreement whatever was made, but that Grossman was looking for information concerning the transportation of the freight in question and inquired about rates, when Newman said that the time for transportation would be approximately the fourth morning, but a great deal depended upon Grossman's getting in touch with the Michigan Central in Detroit and arranging for the prompt forwarding of the cars. Newman said that Grossman never agreed with him as to shipping the freight in question, but the only conclusion reached was that Newman should wire a representative of the Michigan Central in Detroit to meet Grossman and give him any suggestions that he might be able to furnish, and in fact such a representative did call upon Grossman, as Grossman admits, and as the result of that call the goods were shipped over the Michigan Central and a bill of lading issued therefor by the Michigan Central which the plaintiff accepted and as to which no question has ever been raised. Furthermore, the letter sent after the interview between Grossman and Newman, which Grossman relies upon as corroborating his theory that an agreement was made between them, is in direct contradiction to such a theory. The letter is signed in the name of the general eastern freight agent of the New York Central, initialed by Newman, refers to the conversation between Grossman and Newman, and shows that instead of any agreement having been arrived at between plaintiff and the New York Central, through their respective representatives, no agreement was possible at that time as the rates could not be quoted until the classification of the goods to be shipped was known. Furthermore, that letter stated that the time in transit from Detroit to the Bush docks was approximately the fourth morning, but gave no indication that any agreement as to any absolute time for delivery had been fixed. The testimony shows that Grossman consulted with a representative of the Michigan Central in Detroit with reference to the shipment of these goods, made the agreement for plaintiff with the Michigan Central for their shipment from Detroit to the Bush Terminal Building in Brooklyn, delivered

the goods to the Michigan Central at Detroit, received its bill of lading therefor in accordance with law, made out upon the form of the Michigan Central and signed in its behalf by its agent, and had no further dealings of any kind with the New York Central. The plaintiff accepted this bill of lading without question, and proved no other or further agreement. The finding of the jury, therefore, that there was any agreement between the plaintiff and the New York Central by which the latter agreed to deliver plaintiff's goods at the Bush Terminal Building not later than the fourth morning after their receipt in Detroit (or at any other time) is without evidence to sustain it and is reversed. The plaintiff virtually conceded that it had failed to prove such an agreement as it set forth in its complaint, for during the examination of the witness Delgado it moved to amend its averments as to the alleged agreement with the New York Central so that such agreement was claimed to have been not only to deliver upon the fourth morning following receipt thereof by the defendant, but also "at all events with reasonable despatch and within a reasonable time from the date that the same was delivered to the defendant at its terminals at Detroit." This interjected an entirely new issue into the case and defendant's objection to the allowance of the amendment should have been sustained. It was error, in view of the record, to permit such an amendment. The assigned purpose of the amendment was to conform the pleadings to the proof, but the proof in question had been improperly received under objection and exception and afforded no basis for the alteration in the pleadings. The action of the trial court, therefore, in allowing this amendment is reversed.

Furthermore, there is neither claim nor proof that this alleged agreement to expedite the delivery of the plaintiff's goods was based upon any agreement by the plaintiff to pay a higher rate than that exacted for ordinary shipments. It has been held that a carrier who agrees to expedite a shipment in interstate commerce assumes a more burdensome liability and can exact a higher rate than where mere carrier liability exists; that an interstate carrier can assume an extra liability for expediting provided it makes and publishes a rate therefor



open to all; and that an agreement with a particular shipper to expedite a shipment at regular rates, where no rate has been published for expediting, is a discrimination and as such a violation of the Interstate Commerce Act and relief on the contract will be denied. (See *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155; *Atchison, etc., R. Co. v. Robinson*, 233 id. 173.) The rights of the parties herein are to be measured solely by the bill of lading for the goods issued by the Michigan Central. (*Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469; *Reid v. American Express Co.*, 241 id. 544; *D'Utassy v. Barrett*, 219 N. Y. 420.) Under that bill of lading the New York Central would be liable to plaintiff for the damage done to its goods while in process of shipment over the New York Central lines from Buffalo to Brooklyn. It was this liability which the New York Central recognized when it admitted liability in the sum of sixty-three dollars and seventy-one cents claimed in the first cause of action, being the actual damage done to the plaintiff's goods between the time they left Suspension Bridge in good order and arrived in Brooklyn in a damaged condition. But that is the only amount for which the New York Central is liable under the bill of lading, which contains a provision that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment; and using that basis for the computation of the damage, plaintiff is entitled only to the actual damage to its property and not to any consequential damage arising either from its delayed delivery or from an inability to use it for any period of time because of its damaged condition.

It follows, therefore, that the judgment appealed from should be modified by deducting therefrom the sum of \$156 awarded upon the second cause of action, and as so modified affirmed, with costs to the respondent, appellant, New York Central Railroad Company.

CLARKE, P. J., SMITH, PAGE and SHEARN, JJ., concurred.

Judgment modified as stated in opinion, and as modified affirmed, with costs to the New York Central Railroad Company. Order to be settled on notice.

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First Department, February, 1918.

JOSEPH HABER, Appellant, v. ALEXANDER ORSZAG, Respondent.

First Department, February 21, 1918.

**Partnership — validity of agreement creating — provision that one partner shall not be liable for debts incurred by the other.**

An adequate and unequivocal written agreement establishing a partnership is not affected by a provision that one of the parties shall not be liable for debts or liabilities incurred by the other in the business.

Said parties having agreed so to associate themselves, it was competent for them to determine how the profits and losses should be apportioned.

APPEAL by the plaintiff, Joseph Haber, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 16th day of October, 1917, dismissing the complaint at the close of plaintiff's case upon the decision of the court after a trial at the New York Special Term.

*Jacob Zelenko* of counsel [*Leon Sanders* with him on the brief; *Leon Sanders*, attorney], for the appellant.

*Joel Krone* of counsel, for the respondent.

DOWLING, J.:

This action was brought for the dissolution of a copartnership between the parties herein and for an accounting of the partnership affairs. The complaint was dismissed upon the erroneous theory that the parties were not copartners. The agreement between them was in writing and constituted them copartners in the business of manufacturing and selling Hungarian playing cards. They repeatedly characterize themselves in the agreement as copartners, and their relation as that of a copartnership. Every clause of the contract demonstrates that it was their intention to form a copartnership, and that intention they effectuated by a proper and adequate written agreement. The fact that they agreed, among other things, that plaintiff herein should not be liable for debts or liabilities incurred by the defendant in the business, did not destroy the character of the association as a partnership. Having agreed so to associate themselves, it was competent for them to determine how the profits and losses should be

apportioned. The case of *Freeman v. Miller* (157 App. Div. 715), relied upon by the court below, has no application to the case at bar. In that case there was no written agreement of copartnership, and this court held that no such agreement had been proved by which plaintiff therein was to have an interest in the business or in the profits as such, but merely a compensation for his services to be measured by the profits. Here there is a written, unequivocal, explicit agreement of partnership.

The following findings of fact are reversed as being absolutely without evidence to support them: III, IV and V; also those numbered I and II are reversed as inadequately stating the terms of the written agreement. The conclusions of law are also reversed.

The judgment appealed from will be reversed and a new trial ordered, with costs to appellant to abide the event.

SCOTT, LAUGHLIN, SMITH and DAVIS, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order to be settled on notice.

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ALAN HENRY HAAS, an Infant, by HENRY L. HAAS, His Guardian ad Litem, Appellant, v. HAROLD H. NEWBERY, Respondent.

First Department, February 21, 1918.

**Trial — action for personal injuries — challenge of juror for cause — when juror impartial.**

Where during the selection of the jury in an action for damages claimed to have been sustained by an infant who was run over by defendant's automobile, after plaintiff had exhausted all his peremptory challenges, one of the jurors volunteered the statement that he operated a car and had a "sort of prejudice against a case of this sort," and asked the court to excuse him, and thereupon he was challenged for cause by plaintiff's counsel and his examination by the court did not establish that he *would* decide the case on the evidence alone, regardless of his prejudices, the challenge should have been sustained and the refusal so to do constitutes reversible error.

A juror to be held to be impartial must be indifferent as he stands unsworn.

APPEAL by the plaintiff, Alan Henry Haas, an infant, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 16th day of February, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of March, 1917, denying plaintiff's motion for a new trial made upon the minutes.

*George B. Class*, for the appellant.

*Fred H. Rees* of counsel [*Otto D. Parker*, attorney], for the respondent.

DOWLING, J.:

This action was brought to recover damages claimed to have been sustained by a boy under eight years of age through defendant's negligent operation of his automobile, as the result of which the boy was run over, sustaining severe injuries. During the selection of the jury, after plaintiff had exhausted all his peremptory challenges, one of the jurors volunteered the statement that he operated a car and had a "sort of prejudice against a case of this sort" and asked the court to excuse him. Thereupon he was challenged for cause by plaintiff's counsel. The court then proceeded to interrogate him as follows: "Q. You think you have a prejudice? A. Well, I have a sort of prejudice against this kind of case. Q. Is it such a prejudice that would prevent you from rendering a fair and impartial verdict on the evidence? A. In a case of this kind. Q. I ask you on what ground do you base your prejudice? A. I drive through the city streets so considerably, and I come in contact with children playing around the streets. Q. Do you not recognize that every case must stand upon its own merits; that some men may be negligent; that some may be careful, and the mere fact of experience in going through our streets would preclude hundreds of men from sitting on juries? Notwithstanding your experience, do you not think, if you took an oath here as a juror, you could listen to the evidence and decide it on the evidence, fairly and justly to the best of your ability? A. Yes. Q. You could do that? A. Yes. The Court: Swear the jury. Mr. Class: I take an exception."

The challenge interposed should have been sustained by the trial court, and the refusal so to do constitutes reversible error. The rule of law is, and always has been, that the juror to be held to be impartial must be "indifferent as he stands unsworn." (Co. Litt. 155b.) The examination of the juror in question shows that he never withdrew his admission that he entertained a prejudice of some kind against an action to recover damages for injuries caused by an automobile, because of his own experience as a driver of a car, and the court itself recognized that the prejudice was still existent, even though it substituted the word "experience" therefor in its question. Nor was the final part of the question whether the juror would decide the case on the evidence alone, regardless of his prejudice, but whether he could so decide. This left the matter of the juror's attitude towards the litigant so uncertain and problematical that, even apart from the objection that his impartiality was dependent on his being accepted and sworn as a juror, he should not have been accepted and the challenge should have been sustained.

The judgment and order appealed from will, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

SCOTT, LAUGHLIN, SMITH and DAVIS, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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JOHN H. WIEMERS, INC., Respondent, v. THE AMERICAN FIDELITY COMPANY, Appellant.

First Department, February 1, 1918.

**Insurance — indemnity — injury to employee operating a machine upon which it is forbidden by section 93 of Labor Law that he shall work if under sixteen years of age — question of age for the jury.**

Where a policy insuring plaintiff against loss from the liability imposed by law for damages for personal injuries suffered by any employee of the insured states that it does not cover loss or expense for injuries caused to or by any one employed by the insured contrary to law and in an action on the policy it appears that the employee who was injured

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was employed by plaintiff in operating a machine upon which it is forbidden, by section 93 of the Labor Law, that an infant under sixteen years of age shall be employed, the question of the employee's age is for the jury.

APPEAL by the defendant, The American Fidelity Company, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 7th day of June, 1917, granting plaintiff's motion for a reargument of its motion to set aside the verdict herein and for a new trial, and granting its motion to set aside the verdict and for a new trial.

*Joseph M. Proskauer* of counsel [*Elkus, Gleason & Proskauer*, attorneys], for the appellant.

*Maurice B. Blumenthal* of counsel [*Maurice B. & Daniel W. Blumenthal*, attorneys], for the respondent.

SCOTT, J.:

The action is brought upon a policy of liability insurance which purported to insure plaintiff against loss from the liability imposed by law for damages for bodily injuries accidentally suffered by any one of the employees of the insured. The plaintiff had been sued by one of its employees so injured, and after a trial had been cast in damages, which it now seeks to recover.

The policy contains a clause limiting the liability of the insurer as follows: "This policy does not cover loss or expense for injuries or death \* \* \* caused to or by any person employed by the insured contrary to law." It appeared that the employee who was injured was employed by plaintiff in operating a machine upon which it is forbidden by the Labor Law (Consol. Laws, chap. 31 [Laws of 1909, chap. 36], § 93, as amd. by Laws of 1910, chap. 107) that an infant under sixteen years of age shall be employed, and the defendant asserted and undertook to show that the injured employee was in fact, at the time he was injured in July, 1913, under the prescribed age. This became the crucial point in the case.

It appeared that this same question with others, had been litigated in the action between the injured employee and this plaintiff, and the trial justice was induced to direct a verdict, in the present case, against the plaintiff upon the

theory that the fact that the employee was under sixteen years of age was *res adjudicata* as between the parties to this action. Upon reflection the learned justice was quick to see that this ruling was erroneous, and promptly granted plaintiff's motion to set aside the verdict and for a new trial. It is from that order that this appeal is taken.

The defendant, appellant, now concedes that the verdict was directed in its favor upon an erroneous theory, but insists that there was another ground upon which the verdict should have been directed, and consequently that it was properly directed, notwithstanding the reason given for that direction was admittedly erroneous.

The only direct evidence as to the employee's age was that given by his father who swore as to the date of his son's birth, notwithstanding that he was totally unable to testify as to the date of birth of any other one of his six children. He claimed that his recollection was refreshed by looking at a paper which was not made out by himself and was properly excluded as evidence. The appellant relies upon a single sentence excerpted from the opinion of the Court of Appeals in *Hull v. Littauer* (162 N. Y. 569, 572) to the effect that where "the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness." It is argued that if this be the rule applicable to the evidence of a party, it is equally applicable to that of a person not a party, and not directly interested in the result. The opinion from which we have quoted was written in a case in which it had been strenuously contended that it was always, and under all circumstances, erroneous to direct a verdict upon the uncorroborated testimony of a party or of one interested in the event, and the sentence quoted was designed to negative this too broad claim. The rule thus enunciated is, however, surrounded by many limitations not only in the case in which it was stated, but in many other cases decided by the Court of Appeals. In the very case quoted from Judge GRAY says, respecting the evidence of such a witness: "If the evidence is possible of contradiction in the circumstances; if its truthfulness or

accuracy is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it." In *Gordon v. Ashley* (191 N. Y. 186, 193) the court said, speaking of the evidence of an uncontradicted witness: "If a fair argument can be made against the probability of his story, his credibility presents a question for the jury. Even if they do not think that he intended to speak falsely, still they may reject his testimony if they are satisfied that he was mistaken owing to interest, bias, a defective memory or any other reason springing from the evidence."

In the case before us there are many things in the testimony of the employee's father which call for the application of the exceptions to the rule relied upon by appellant, rather than of the rule itself. It is not necessary to point them out here. It is sufficient to say that, in our opinion, the question of the employee's age was one which should have been submitted to the jury.

The order appealed from is affirmed, with costs.

CLARKE, P. J., LAUGHLIN, PAGE and SHEARN, JJ., concurred.

Order affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. POSTAL TELEGRAPH-CABLE COMPANY, Respondent, v. STATE BOARD OF TAX COMMISSIONERS, Appellant, and the CITY OF NEW YORK, Intervenor, Appellant.

First Department, February 15, 1918.

**Tax — telegraphs and telephones — taxation of franchise of telegraph company incorporated under chapter 265 of the Laws of 1848, as amended — effect of granting of subsequent license to said company under Post Roads Act — enforcement of collection of tax.**

The right granted by the State to a telegraph company incorporated under chapter 265 of the Laws of 1848, as amended, to occupy the streets and navigable waters within the limits of the city of New York, constitutes a special franchise taxable as real property under the Tax Law.



A license given to said company under the Federal Post Roads Act to use the facilities which had been granted by the State, and giving the further right to extend such facilities upon the post roads in other States, gave to said company no property rights in the streets and did not destroy the special franchise granted by the State, but supplemented it, and, therefore, did not affect the right of the State to tax said franchise.

The enforcement of the tax on such a special franchise, pursuant to section 306 of the Tax Law by sequestration or by action at law, will not violate the Post Roads Act.

APPEAL by the defendant, State Board of Tax Commissioners, and by the intervenor, the City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of June, 1917, reducing the assessment for purposes of taxation of certain special franchises in the boroughs of Manhattan, The Bronx and Brooklyn owned by the relator.

*Martin Saxe* of counsel [*Charles R. McSparren* with him on the brief; *Merton E. Lewis, Attorney-General*], for the defendant, appellant.

*William H. King* of counsel [*Addison B. Scoville* with him on the brief; *Lamar Hardy, Corporation Counsel*], for the intervenor, appellant.

*D-Cady Herrick* of counsel [*William W. Cook, Henry G. Fritsche* and *George H. Mallory* with him on the brief; *Henry G. Fritsche, attorney*], for the respondent.

PAGE, J.:

The proceeding was instituted by petition for and allowance of a writ of certiorari by the Postal Telegraph-Cable Company, to review assessments levied by the State Board of Tax Commissioners for the year 1912 against the special franchises of the relator in the various boroughs of the city of New York. For the purposes of the trial the parties entered into a stipulation whereby the relator waived the issue of overvaluation raised in its petition, and agreed not to contest the assessment on the relator's tangible properties in the streets, highways, public places and public waters of the city of New York, and not to contest the assessment on

relator's intangible properties in the streets, highways, public places and public waters on the ground of overvaluation but that the same may be contested on the ground of illegality, as set forth in paragraph 5, which reads as follows: "That the sole issue to be tried herein is whether in view of the Post Roads Act (U. S. Revised Statutes, Sections 3964, 5263 to 5269 and Chapter 9 of Volume 23 of the U. S. Statutes at Large\*) the relator's franchise rights, authority or permission to construct, maintain or operate its telegraphic properties and appurtenances in streets, highways, public places or public water in the City of New York are subject to taxation by the State Board of Tax Commissioners under the provisions of the Tax Law of the State of New York."

The parties do not agree upon the effect and meaning of this stipulation, the relator claiming that it has the right to review the assessment upon the ground that its sole right to use the streets, highways, public places and public waters is derived from its permission to use the same from the United States government, by virtue of its acceptance of the terms and conditions of the "Post Roads Act," and also to have the assessment declared illegal on the ground that what is termed by counsel its Federal franchise was included in the assessment together with its State special franchise, while the defendants claim that the sole question to be considered is whether this so-called Federal franchise has superseded the State special franchise so that there is no special franchise that is subject to taxation by this State. It is conceded that the State would have no power to tax a Federal franchise. Interpreting the stipulation in connection with the petition of the relator, the construction placed on the stipulation by the defendants would seem to be correct. Subdivision 2 of the petition reads as follows: "That the valuation or assessment of \$366,000 so made as aforesaid, excepting therefrom the tangible property of your petitioner (in value \$135,061) situated in, upon, under or above any streets, highways or public places in the said City of New York, was *entirely* based upon the value of franchises, rights, authority or permission that were not granted, had or enjoyed from the State of New

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\* See p. 3.—[REP.]

York or the City of New York, but were granted, had and enjoyed from the United States Government, and from the owner of the fee of the adjoining premises."

As all the issues are waived by the stipulation except that of the illegality of the assessment upon the grounds set forth in paragraph 5, it would appear to have been the intention that the sole issue should be that specified in paragraph 5. In my opinion there is no practical difficulty presented by the difference of construction of the stipulation.

The relator was incorporated under the name of the New England Telegraph Company on the 10th day of August, 1883, under and pursuant to an act of the Legislature of the State of New York passed April 12, 1848 (Laws of 1848, chap. 265), entitled: "An act to provide for the incorporation and regulation of telegraph companies" and the acts amendatory thereof and supplementary thereto, as stated in the certificate of incorporation for the purpose of constructing a line or lines of aerial or underground wires of telegraph from and to points within this State, and for the purpose of owning, constructing, using and maintaining a line or lines of aerial or underground, electric telegraph within and partly beyond the limits of this State, and for the purpose of owning interests in such a line or lines of electric telegraph and any grants therefor. It was further stated: "The general route of the line of telegraph of said association and the points to be connected are as follows, viz.: from a main office in the vicinity of the Produce Exchange in the City of New York, in the State of New York, to other points in said City where branch offices of the said Association may be established, and from such offices along, across, over and under streets and avenues and over buildings in said City to and into buildings therein so as to connect such buildings with the offices of the Association, and to connect all such offices with each other, and also to connect the City of New York with other cities in said State of New York and with various points within such cities and with cities in other States and more particularly with the City of Bangor in the State of Maine."

By section 5 of the act of 1848 and chapter 471 of the Laws of 1853 a company incorporated under said act was authorized to construct lines of telegraph, and to erect and

construct, from time to time, the necessary fixtures for such lines of telegraph upon, over or under any of the public roads, streets and highways, and through, across or under any of the waters within the limits of this State, provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters; and the further right was given to exercise the right of eminent domain and acquire the right to erect and construct such fixtures over other lands. The grant of such a right to occupy public roads, streets, highways and the public waters when included in the act of incorporation, with leave to construct and operate a telegraph line over, under or upon the same, constitutes a special franchise grant direct from the State to the corporation. (*People ex rel. Harlem River & Port Chester R. R. Co. v. Tax Commissioners*, 215 N. Y. 507, 511.) A franchise which authorizes a company to use the public streets for the purpose of constructing, maintaining and operating therein tangible property used in its business "operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality." (*Ghee v. Northern Union Gas Co.* 158 N. Y. 510, 513.) Such a franchise is property which cannot be destroyed or taken away without compensation and survives even the dissolution of the corporation, by a repeal of its charter. (*People v. O'Brien*, 111 N. Y. 1.) These special franchises being property rights, must be either real or personal property and as they are interests in and appurtenant to land are real property, and are correctly so classified in the Tax Law of this State (Cons. Laws, chap. 60 [Laws of 1909, chap. 62], § 2, subd. 3),\* and are taxable as all other real estate (Id. § 3).

The relator argues that because the subsequent license was granted to it by the United States government to construct, maintain and operate lines of telegraph through or over post roads, and over, under or across navigable streams or waters of the United States, the special franchise there-

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\* Now Tax Law, § 2, subd. 6, as amd. by Laws of 1916, chap. 323.—  
[RBP.]

tofore granted by the State became a nullity. This leads to a determination of the scope and effect of the Federal license, and to what extent the United States government could, under the Constitution, thus appropriate the public highways of a State, or the streets of a municipality, when the highways and streets were owned, constructed and maintained by the State or municipality. For if such power has been delegated to Congress the exercise of such power suspends and overrides all State statutes with which it is in conflict (*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9), and the subject is effectively removed thereafter from State interference, for the Constitution of the United States and the laws made pursuant thereof are the supreme laws of the land. (U. S. Const. art. 6, cl. 2.) Congress has power "to regulate commerce with foreign nations and among the several States" (U. S. Const. art. 1, § 8, subd. 3), and "to establish post offices and post roads." (Id. subd. 7.) Pursuant to this authority Congress has provided by section 3964 of the United States Revised Statutes: "The following are established post-roads: All the waters of the United States, during the time the mail is carried thereon. All railroads or parts of railroads which are now or hereafter may be in operation. \* \* \* All letter-carrier routes established in any city or town for the collection and delivery of mail matters," and by act of March 1, 1884, further provided: "That all public roads and highways while kept up and maintained as such are hereby declared to be post routes." (23 U. S. Stat. at Large, 3, chap. 9.) The words "post-roads" and "post routes" as above used are clearly intended to be synonymous. (*Western Union Tel. Co. v. Penn. R. R.*, 195 U. S. 540, 557; *Western Union Tel. Co. v. Richmond*, 224 id. 160, 165; *New England Telegraph Co. v. Town of Essex*, 206 Fed. Rep. 926, 931.) Therefore, Congress has made all the streets of New York city and the public roads, highways and navigable waters within this State post roads.

On the 24th of July, 1866, the Congress of the United States passed an act which, among other things, provided: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate

lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." It was further provided: "That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value \* \* \*. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act." (14 U. S. Stat. at Large, 221, 222, chap. 230, §§ 1, 3, 4; U. S. R. S. § 5263 *et seq.*)

On July 26, 1884, the relator duly accepted the provisions of the act of 1866. It becomes necessary to determine the extent and limitations of the license thus acquired from the United States government. The United States, by the passage of the Post Roads Act, acquired no right to the fee of the streets or roads, nor any property right therein. To so hold would render the act unconstitutional. The streets and highways when owned by a State or municipality are, with respect to the United States, private property of which they could not be deprived except by due process of law, and upon a just compensation. (See U. S. Const. 5th Amendt.; State Const. art. 1, § 6.) The right, therefore, of the United States was to use such streets and highways for the transportation of the mails, in common with the public, freed from molestation or interference.

A State or municipality could close the street or highway, and the right of the United States to use the same as a post road would cease with the cessation of such use by the public. So long, however, as the street or highway was open to the public the State or municipality could not prevent its use by the United States as a post road. The United States govern-

ment can no more appropriate a street or highway which is owned by a State or municipality to the use of a telegraph company without the consent of the State or municipality, than it could take one of the public buildings so owned, and establish it as a post office without such consent. The cases which have been decided by the United States Supreme Court with respect to the rights of telegraph companies to use the post roads have related to the rights of such companies, incorporated in one State, to use the post roads, as declared by the above-mentioned statutes, in another State. It is not necessary to review these cases in detail; they have been collated and summarized in a recent opinion of that court (*Western Union Telegraph Co. v. Richmond*, 224 U. S. 160), which involved the right of a municipality to exact compensation for the right to use the public streets. The court said (p. 169): "The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. (*Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U. S. 540, 574.) It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.) It has been held to prevent a State from stopping the operation of lines within the act, by injunction for failure to pay taxes. (*Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530.) But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or State where it owns the land. (*St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 101; *S. C.*, 149 U. S. 465; *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 771; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357.)" In a later case (*Williams v. Talladega*, 226 U. S. 404) the

court said: "These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character, and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders, or from imposing a license tax upon the right to do a local business within the State." And the portion of the opinion quoted from the case of *Western Union Telegraph Co. v. Richmond* (*supra*) is reaffirmed in *Essex v. New England Telegraph Co.* (239 U. S. 313, 320).

Applying these principles to the case at bar, it follows that the right to occupy the streets and navigable waters within the limits of New York city was granted to the relator by the State and not by the United States government; that the license under the "Post Roads Act" gave the relator the right to use these facilities, which had been granted by the State without the interference by the State with their use and enjoyment and further gave the relator the right to extend such facilities upon the post roads in other States for the transaction of its interstate commerce; that this permission by the United States gave to the relator no property rights in the street, but the State grant did, and the State has the right to tax all the property both real and personal within the State the same as it does the property of others. The so-called Federal license did not destroy the special franchises granted by the State but supplemented them; created no new rights in the streets, but insured the enjoyment of those granted by the State. It is not a franchise and hence was not and could not be included in those special franchises which have been taxed by the State Board of Tax Commissioners as a portion of the real estate of this company. There is nothing to the contrary in the case of *California v. Pacific R. R. Co.* (127 U. S. 1). Congress had incorporated a railroad company to build a railroad from the Missouri river to the Pacific ocean. Existing



corporations were allowed to accept the benefits of this act and connect their roads with the line and in extension thereof. The various Pacific railroad companies that were parties to this action accepted the act and constructed a portion of the line which connected with their lines. Therefore, a portion of their roads within the State of California were built under the State franchise and a portion under the United States franchise. The State Board of Equalization proceeded to assess a franchise tax based upon the entire line, and the United States Supreme Court held that the State of California had no power to tax the franchise granted by Congress and as all the franchises had been included, National as well as State, the entire assessment was void. In the case of *Central Pacific Railroad v. California* (162 U. S. 91) it appeared that the State Board of Equalization had only assessed the franchise granted by the State of California and the court held that valid, and said: "If the State franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the State to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the State right subordinate to the Federal right, and did not destroy the State right nor merge it into the Federal right." (p. 127.)

Therefore, these cases relied upon by the relator are not authorities in support of its contention, but to the contrary.

Section 306 of the Tax Law\* provides for the collection of certain taxes, including special franchise taxes, by sequestration, or by action at law, and hence the enforcement of these taxes in such a manner would not violate the "Post Roads Act." (*Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 554.)

The assessment was a valid exercise of the taxing power of this State.

The order in so far as appealed from and the findings inconsistent herewith will, therefore, be reversed and the assessments in the boroughs of Manhattan, The Bronx and Brooklyn confirmed, and the writ of certiorari dismissed, with costs to

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\* Since amd. by Laws of 1916, chap. 323.—[R&P.]

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the intervenor, to be taxed pursuant to section 294 of the Tax Law.

CLARKE, P. J., DOWLING, SMITH and SHEARN, JJ., concurred.

Order reversed, assessments confirmed and writ dismissed, with costs to intervenor. Order to be settled on notice.

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AMVERNETTE M. CROMBIE, Appellant, v. ILLINOIS SURETY COMPANY, Respondent.

First Department, February 21, 1918.

**Trial — erroneous direction of verdict upon the merits for defendant — evidence — admissions — admissibility against defendant of copy of judgment roll in prior action — action upon agreement for discharge of all collateral — evidence as to position and duties of representative of defendant who executed said agreement.**

A direction of a verdict in favor of the defendant upon the merits is erroneous where there is no evidence to establish such right of the defendant.

An answer produced from the judgment roll in a prior action against a defendant corporation is admissible as an admission against it and the officer who verified the same, although it is a copy.

In an action against a surety company under an agreement for the discharge of collateral deposited as security for a bond, it is error to refuse to allow the plaintiff to show that the person who executed the agreement for the defendant had a desk in its office, what names were on the door of the room and what duties said person performed.

APPEAL by the plaintiff, Amvernette M. Crombie, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 7th day of June, 1917, upon the verdict of a jury rendered by direction of the court dismissing the complaint upon the merits, and also from an order entered in said clerk's office on the same day denying plaintiff's motion for a new trial made upon the minutes.

*Gormly J. Sproull* of counsel [*John McG. Goodale* with him on the brief; *Sproull, Harmer & Sproull*, attorneys], for the appellant.

*Abram J. Rose* of counsel [*Alfred C. Petté* with him on the brief; *Kellogg & Rose*, attorneys], for the respondent.

PAGE, J.:

The action was brought to recover the sum of \$7,000 under an alleged written agreement.

Upon the trial the learned justice on the objection of the defendant's attorneys excluded nearly all of the evidence that the plaintiff offered, most of which was erroneously excluded, and at the close of the plaintiff's case the attorney for the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to prove any cause of action, and on the court's suggestion rested and moved for a direction of a verdict. The court thereupon directed a verdict in favor of the defendant. Of course, such direction is entirely erroneous, as there was no evidence whatsoever to show that the defendant was entitled to a verdict upon the merits; at most the complaint should have been dismissed for lack of proof. The facts, so far as they can be gleaned from the pleadings and documents that were offered in evidence and excluded but were marked for identification and, therefore, in the record, appear to be as follows: that one Scott was indicted for grand larceny and the defendant gave a bail bond in the penal sum of \$15,000 for his appearance for trial. As collateral security for this bond there was deposited with the defendant \$4,000 in cash, a deed from Mrs. Scott to her husband, a bond from Scott to the plaintiff and mortgage from Scott and wife to plaintiff in the sum of \$3,000. It does not clearly appear whether this collateral was deposited by the plaintiff or by the Scotts. A portion of a judgment roll in an action by Mrs. Scott against the defendant was offered in evidence and excluded. In the answer in that case the defendant averred that the plaintiff herein claims the ownership and right to possession of the bond and mortgage and that she was a necessary party defendant. This was offered as an admission against the defendant and excluded on the ground that although the answer was produced from the judgment roll it was a copy, and that it would not be binding as against the defendant but only as against the officer of the defendant who verified the same. Both of these grounds were erroneous. The alleged agreement on which the suit was brought was excluded on the ground that Kunzman's authority had not been proved. There had been put in

evidence the power of attorney on behalf of the defendant to Kunzman, authorizing him to sign, seal, acknowledge and deliver in its name, place and stead, as surety, bonds, undertakings or writings obligatory in the nature thereof to bind the company as fully and to the same extent as if said bonds, undertakings or writings obligatory in the nature thereof were executed by the executive officers of the company at its home office in the city of Chicago, and the document upon which the action was founded is written upon a letterhead of the company which expressly states that Kunzman is assistant manager, and furthermore, Mackey, the manager, testified that Kunzman was his assistant; that he had power to sign bonds, countersign checks and other things in attending to the conduct of the business, write bonds and take collateral security. The court, however, sustained the objection as to what Kunzman did in regard to cancellation of bonds and discharge of collateral.

The trial justice also refused to allow the plaintiff to show that Kunzman had a desk in the office of the company, what names were on the door of the room in which Kunzman had a desk, or to prove further than as above stated, what duties Kunzman performed, all of which was error.

The counsel for the defendant, although having kept out all of this evidence by his objections, does not attempt to defend the propriety of the exclusion of the testimony, but claims that as the plaintiff could not have succeeded had he put in his *prima facie* case, the exclusion of the evidence was not prejudicial error.

We could have judged better of the correctness of his present position had the plaintiff been allowed to prove a *prima facie* case.

The judgment must be reversed, with costs to the appellant, and a new trial ordered.

CLARKE, P. J., LAUGHLIN, DOWLING and SHEARN, JJ., concurred.

Judgment reversed, with costs, and new trial ordered.

U. S. EXPANSION BOLT CO., Appellant, v. JOHN MARMORSTEIN,  
Respondent.

First Department, February 21, 1918.

**Contracts — mutuality — provision against difficulties and hardships of performance — pleading — counterclaim must be complete in itself.**

A contract by the owner of letters patent engaged in manufacturing articles thereunder, granting the exclusive selling rights to another who agrees to purchase a certain quantity at a fixed price, is not rendered void for want of mutuality by a provision that in case the owner of the patents shall not be able to furnish the articles as ordered by the other party to the contract, he shall not be held liable in damages by said party. Said provision of the contract does not give the owner the right arbitrarily or of his own volition to terminate it. It is merely a protection against unforeseen difficulties that might arise which would, without his fault or neglect, make it impossible for him to perform.

In an action to procure the cancellation of a contract on the ground of fraud, a counterclaim for damages for breach on the part of the plaintiff is defective, where it fails to allege due performance by the defendant.

A counterclaim must be complete in itself, and the court cannot supply omissions or necessary allegations by reference to other parts of the answer or the complaint.

APPEAL by the plaintiff, U. S. Expansion Bolt Co., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of May, 1917, overruling a demurrer to the counterclaim set up in the answer.

*Harry E. Herman* of counsel [*Arthur O. Ernst* and *Edwin A. Falk* with him on the brief], for the appellant.

*Simon Sultan* of counsel [*Harry C. Adams*, attorney], for the respondent.

PAGE, J.:

The action is to procure the cancellation of a contract on the ground of fraudulent representations made by the defendant in procuring the contract to be made. The defendant answered denying the material allegations of the complaint, and alleged a counterclaim for damages for breach of

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the contract on the part of the plaintiff. The plaintiff demurred to the counterclaim on the ground of insufficiency, and the demurrer was brought on as a contested motion. The claim of the plaintiff at the Special Term and on this appeal is that the contract is void for want of mutuality. The contract recites that the defendant is the owner of certain letters patent and engaged in manufacturing articles under said patent. The contract grants the exclusive selling rights of the said articles for the entire life of the patent, that is, until September 16, 1930, to the plaintiff. The plaintiff agrees to purchase from the defendant said articles to the amount of \$2,400, and an increased amount each year as therein specified until the sixth year, when the amount agreed to be purchased shall be \$5,000, and thereafter the amount shall be at least \$5,000 in each year. The defendant agrees to furnish said articles pursuant to a schedule of sizes and prices therein specified, and the plaintiff agrees to pay for all goods purchased upon the terms therein specified.

There can be no question that, so far as above quoted, the contract is mutually binding upon the parties and is a valid contract. The plaintiff claims, however, that the following clause destroys this mutuality: "7. It is further understood and agreed that in case the party of the first part [the defendant] shall not be able to furnish the said Stop-a-Leaks [the patented article] as ordered by the party of the second part [the plaintiff], the party of the first part shall not be held liable in damages by the party of the second part." This provision of the contract does not give the defendant the right arbitrarily or of his own volition to terminate it. It is merely a protection against unforeseen difficulties that might arise which would without his fault or neglect, make it impossible for him to perform. It is a well-recognized rule that contracts should provide against difficulties and hardships of performance. For if they are not provided against, the party will not be excused, no matter how great may be the difficulty to be overcome or the hardship incurred in performance. Instead of providing specifically against the happening of contingencies that might be foreseen which would affect defendant's ability to perform, such as strikes of his workmen, destruction of his plant by fire, and other

like events, which are frequently embodied in a contract, this contract has provided generally that for anything that might happen which would render the defendant unable to furnish the articles as ordered, he should not be held liable in damages. When such contingencies are provided against in the contract, the contract is not by the provision rendered unenforcible until the contingency happens. The obligation rests upon defendant to perform the contract according to its terms and conditions until he is deprived of his ability to do so. The contract, therefore, was mutually binding. It not appearing that defendant was not able to fulfill plaintiff's orders, the plaintiff must be held liable to respond in damages for the breach on its part.

There is, however, a defect in the counterclaim which has not been referred to in the briefs of counsel. There are no allegations in the counterclaim of due performance of the terms and conditions on defendant's part to be performed. The contract contains agreements on defendant's part that would have to be performed before plaintiff could be put in default. The counterclaim must be complete in itself, and we cannot supply omissions of necessary allegations by reference to other parts of the answer or the complaint.

The order will, therefore, be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs, with leave to the defendant to serve an amended answer upon payment of the said costs within ten days from service of a copy of the order herein, with notice of entry thereof.

CLARKE, P. J., LAUGHLIN, DOWLING and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, with leave to defendant to amend on payment of costs.

PFALTZ & BAUER, INC., Respondent, v. ROBERT O. WIENER,  
Appellant.

First Department, February 21, 1918.

**Principal and agent — misrepresentation of authority to act as agent — election to hold as principal agent who misrepresents authority — attachment — moving papers — failure to embody evidence establishing agency.**

Where a person falsely holds himself out as an agent of another the person with whom he deals may elect to hold him as a principal.

A plaintiff who seeks to sustain a warrant of attachment upon the ground that the person with whom the contract involved in the suit was made was an agent of the defendant, must not omit from his moving papers readily available evidence of the existence of the agency.

APPEAL by the defendant, Robert O. Wiener, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of December, 1917, denying his motion to vacate or reduce a warrant of attachment herein.

*Theodore B. Richter* of counsel [*Abraham L. Gutman* with him on the brief; *Robert M. Gluck*, attorney], for the appellant.

*Lynn W. Thompson*, for the respondent.

SHEARN, J.:

The plaintiff's claim arises out of an alleged sale to it of Spanish licorice root by the defendant, a resident of London. The transaction was conducted entirely with one Warschauer, and the validity of the attachment sought to be vacated depends upon proof of Warschauer's agency. There is no competent proof whatever that Warschauer was an agent of the defendant in the transaction. He pretended to be an agent and the situation was such as to lead the plaintiff to believe that he was defendant's agent, but neither Warschauer's declarations nor the plaintiff's belief constitute proof of agency. Even if there were proof of agency, the plaintiff was in a position where, as shown by the affidavit of its president, it could have elected to hold Warschauer



as a principal. The plaintiff claimed that the oral contract on which it bases its rights was confirmed by a letter that it addressed to Warschauer, yet for some reason this letter is not incorporated in the affidavit in support of the attachment. The omission to exhibit this letter naturally leads to the inference that it would show that plaintiff was dealing with Warschauer as a principal. While the letter would not afford any proof of Warschauer's agency, it might afford very persuasive evidence that plaintiff was not dealing with him as an agent. In attachment cases, where the contract sued upon depends upon proof of agency, the court has recently condemned the practice of omitting from the affidavits available evidence which might aid the court in determining whether the ultimate facts stated in the pleadings have been or can be substantiated. (*Makepeace v. Dilltown Smokeless Coal Co.*, 179 App. Div. 662.)

The order appealed from should be reversed, with ten dollars costs and disbursements, and the attachment vacated.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and attachment vacated.

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ABRAM RATKOWSKY, Respondent, v. A. RATKOWSKY, INC.,  
Appellant.

First Department, February 21, 1918.

**Injunction — suit to enjoin use of trade name by corporation — sale of business and good will to corporation — proof not justifying injunction.**

Suit to enjoin the defendant corporation from using the name "A. Ratkowsky, Inc.," unless the letters "Inc." be printed in letters of the same size and legibility as the preceding words. It appeared that the plaintiff had conducted a business in his own name and transferred the same, together with the good will and assets, to a corporation of the same name formed by him, and, after the corporation had become financially involved and his brother had lent financial aid, the plaintiff sold his stock in the corporation to his brother and agreed not to engage in a similar business

within a certain district in the city of New York. Immediately after severing his connection with the corporation the plaintiff established himself in the same business one block beyond the prohibited zone and thereafter brought the present suit for an injunction. Evidence examined, and held, that the course of the plaintiff does not commend itself to a court of equity and that a temporary injunction should be vacated.

APPEAL by the defendant, A. Ratkowsky, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1917, granting plaintiff's motion for an injunction *pendente lite*.

Harry A. Gordon of counsel [Reuben Tally with him on the brief; Harry A. Gordon, attorney], for the appellant.

Alvin C. Cass of counsel [Cass & Apfel, attorneys], for the respondent.

SHEARN, J.:

Upon the application of the plaintiff, Abram Ratkowsky, the defendant corporation, A. Ratkowsky, Inc., has been enjoined *pendente lite* from using the name "A. Ratkowsky" and from using the name "A. Ratkowsky, Inc.," unless the letters "Inc." be printed or displayed in letters of the same size and legibility as the words or letters "A. Ratkowsky." Plaintiff established himself in the fur business at 28-34 West Thirty-fourth street, New York city, in January or February, 1915, and conducted it under the name "A. Ratkowsky" until April 15, 1916, when he formed the defendant corporation, transferring to it, in consideration of its entire capital stock, "the business now conducted by me at 28-34 West 34th Street, in the Borough of Manhattan, City of New York, a statement of the assets and liabilities of which is hereto attached, together with the good will thereof and the leases of the premises now occupied by me at 28-34 West 34th Street." Prior to forming the corporation plaintiff advertised his business extensively as "A. Ratkowsky" in and about the premises, at the railroad stations and in the subway cars. The signs bearing the advertisements were continued by the defendant corporation, and are the signs which the defendant is restrained from

using. In April, 1916, plaintiff was in financial difficulties, the banks having refused to make further loans, and his brother, Bernard Ratkowsky, came to his assistance, loaning him \$5,000 toward the end of April, 1916, and indorsing \$15,000 notes in May, 1916, which the plaintiff cashed. The business went from bad to worse and, on bankruptcy being threatened, Bernard Ratkowsky was prevailed upon to enter the business and finance it in an effort to save it. Accordingly, on August 17, 1916, the capital stock of the defendant was increased by \$25,000 preferred stock, which was issued to Bernard Ratkowsky for \$25,000 cash invested by him. The plaintiff and his brother were employed of record by the corporation, the former at a salary of \$5,000 per annum, and the latter at a salary of \$10,000. On June 15, 1917, plaintiff's salary was increased to \$10,000 per annum, and the common stock of the corporation was divided so that Bernard Ratkowsky received fifty-one per cent and the plaintiff forty-nine per cent under an agreement, however, that the profits upon the common stock were to be divided equally. In addition to the loans and investments above mentioned, Bernard Ratkowsky loaned various other sums to the business, aggregating some \$16,000, and devoted all of his time and attention to the business. Disputes arose, and on October 9, 1917, plaintiff informed his brother that he desired to withdraw from the business and enter the motion picture film business and proposed that his brother buy plaintiff's forty-nine per cent of the common stock. The proposition was accepted and an agreement executed under which Bernard Ratkowsky paid the plaintiff \$40,000. The agreement provided that: "He [plaintiff] will not, for a period of ten years from the date hereof, directly or indirectly as principal, agent or employee, be engaged, interested or employed in any fur business of any nature or kind which is conducted under the firm name or style or trade name embracing the word 'Ratkowsky' or any similar name, within an area of three blocks in all directions from 34th Street, in the Borough of Manhattan, City, County and State of New York, bounded by Fifth Avenue on the east and Sixth Avenue on the west."

Immediately after plaintiff severed his connection with the defendant corporation he established himself in the fur busi-

ness at 435 Fifth avenue in the borough of Manhattan, New York city, between Thirty-eighth and Thirty-ninth streets, one block beyond the prohibited zone fixed in the contract, and commenced advertising extensively his business as "My New and Only Store, A. Ratkowsky," "The Original A. Ratkowsky," and "my new and only address." The plaintiff then insisted that the defendant, which had duly acquired the right to the trade name "A. Ratkowsky" and to the signs long used in the business (the good will and fixtures being valued in the agreement at \$65,000), should desist from using the name "A. Ratkowsky" in its advertising or in connection with its business unless the letters "Inc." were conspicuously made a part thereof. While the defendant was obliged under the General Corporation Law (Consol. Laws, chap. 23 [Laws of 1909, chap. 28], § 6, subd. 1, as amd. by Laws of 1913, chap. 24; Laws of 1916, chap. 222, and Laws of 1917, chap. 594) to append the letters "Inc." to its name, this was the concern of the State and not of the plaintiff. Nevertheless, the defendant agreed to and did proceed to append the letters "Inc." to its name, but this was not done in conspicuous type, whereupon the plaintiff sued and obtained this injunction.

In view of the facts above recited, the course of the plaintiff is not one to commend itself to a court of equity. Having persuaded his brother to come to his assistance and make these very considerable loans and also to enter upon the burden and hazard of making the business successful, involving a large investment and all of the brother's time and attention, and knowing full well that the good will of the business carried the right to employ the trade name "A. Ratkowsky," if not as a corporation name at least to identify the established business, the plaintiff proceeded to do all in his power to injure that good will and lead the public to believe that the fur business, theretofore conducted under the name "A. Ratkowsky" in Thirty-fourth street, had been either abandoned or moved to plaintiff's Fifth avenue address by advertising his new business as "My New and Only Store, A. Ratkowsky," "The Original A. Ratkowsky," and "my new and only address." While under the agreement the plaintiff had a right to resume the fur business outside the prohibited

zone, and while he had a right to use his own name, it was his duty, especially under the circumstances of this case, so to use his name as not to inflict unnecessary injury upon the established business of the defendant, built up and conducted under the name "A. Ratkowsky." It is to be noted that the plaintiff did not even employ his own full name to identify his new business but abbreviated the name so that it was identical with the name of the established business, the good will of which had been sold to the defendant. It is difficult to perceive in this anything except a deliberate intent to injure the business of the defendant and lead the public to believe that the plaintiff was conducting at the Fifth avenue address the business established and known to the trade, conducted by the defendant at the old Thirty-fourth street address. Under the circumstances disclosed, the injunction was unwarranted, and the order appealed from should be reversed, with ten dollars costs and disbursements, and the injunction vacated, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and injunction vacated, with ten dollars costs.

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POPE TRADING CORPORATION, INC., Appellant, v. SAMUEL CUTLER and Others, Respondents.

First Department, February 21, 1918.

**Sale** — suit for breach of contract to sell and deliver goods — trade custom — delivery of bill of lading equivalent to delivery of goods — issue as to time within which bill of lading could be delivered — conflict of testimony — when complaint should not be dismissed as matter of law upon ground that action is prematurely brought.

Where in an action brought to recover damages for a breach of the defendant's contract to sell and deliver certain metal during a certain month it appeared that, according to the custom of the trade, such contracts were fulfilled by delivering bills of lading of the goods to the purchaser

and that such delivery was treated as delivery of the merchandise itself, and there is a conflict of evidence as to the length of time it would take a bill of lading to reach the plaintiff by mail from the shipping point of the goods, it was error for the court to dispose of this question of fact as a matter of law and to dismiss the complaint upon the ground that the action was prematurely brought.

APPEAL by the plaintiff, Pope Trading Corporation, Inc., from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 15th day of June, 1917, upon a dismissal of the complaint by direction of the court at the close of the case.

*Harry Edwards*, for the appellant.

*Aaron Cutler* of counsel [*Myron Wisoff* with him on the brief; *Wisoff & Cutler*, attorneys], for the respondents.

SHEARN, J.:

In this action, brought by the purchaser to recover damages for the breach of a contract of sale of 100 tons of pig lead at an agreed price, the complaint was dismissed upon the ground that the action was prematurely brought. The contract, dated January 11, 1917, recited the sale by the defendants of 100 tons of pig lead (prime western or Balbach's brand, at seller's option) at seven dollars and thirty cents per 100 pounds, lighterage free, port of New York, "Shipment February, 1917, at seller's option. Terms net cash against documents." It is conceded that "Balbach's brand" meant lead produced at Newark, N. J., which would ordinarily be lightered to New York harbor points within two or three days after shipment; that "prime western" lead meant lead produced at any point in the west, which would ordinarily require about two months to be transported to New York harbor points; also that under the contract the defendants had the option to fill the contract by delivering either "prime western" lead or "Balbach's brand," provided only that shipment of either was to be made during the month of February, 1917. The complaint alleged that on or about February 20, 1917, the defendants elected to ship the lead from Newark and notified the plaintiff of said election; that defendants failed to ship such lead during the month of February, 1917, although plaintiff demanded delivery; that

after a reasonable time in which to make delivery the defendants refused to make delivery; that plaintiff duly performed the contract on its part and made due and timely tender of payment in accordance with the terms of the contract. The answer consisted of a general denial, except as to the making of the contract. The proof showed that on February 19, 1917, the plaintiff wrote to the defendants asking to be advised by return mail "from what point this shipment will be made, i. e., will same be shipped from some western point or will it be delivered from a New York refinery." The defendants replied by letter on the following day stating that "this lead will be shipped from Newark, N. J." On February 27, 1917, plaintiff wrote the defendants requesting to be advised as to the date of shipment of this lead. No letter was received in reply. On March 1, 1917, plaintiff again wrote requesting to be advised as to the date of shipment of this lead, but no reply was received. On March 2, 9 and 10, 1917, plaintiff wrote the defendants further letters demanding information as to date of shipment, but no reply was received. On March 12, 1917, plaintiff made its final demand and tender, and on March 14, 1917, this action was begun. Nearly all of the various letters refer to telephone conversations which the letters confirm. There was a sharp contradiction in the testimony concerning these conversations. The defendants claimed and the defendant Samuel Cutler testified that about the 27th of February, 1917, he had a conversation with plaintiff's secretary, Patrick F. Callahan, and told him that "this lead cannot come exactly on the February shipment, as we have the lead from the American, and we are afraid the American can't ship it, so we will get you lead from the west, and we will give you a February bill of lading," and that Callahan said in reply "he wouldn't do anything of the kind, he wants nothing but Balbach lead." This testimony was flatly contradicted by Mr. Callahan. The defendants never shipped any lead from the west or from any other place in fulfillment of the contract, taking the position that the plaintiff violated the contract by insisting upon Balbach lead. It appears that it is the custom of the trade to regard such a contract as filled when the documents or bills of lading are delivered

to the purchaser; that the delivery of the documents is treated as delivery of the merchandise; and that in considering the question of reasonable time the question is not how long it would ordinarily take the merchandise to arrive but within what time could the bill of lading or the documents be delivered in the ordinary course of business. Accordingly, we find considerable stress laid in the testimony and in the briefs on what was a reasonable time for the arrival of bills of lading from the furthest western shipping point, assuming that the lead was shipped on the last day of February, 1917. The only testimony on this subject was given by the defendant Samuel Cutler, and while he said that if shipment was made on the last day of February it would be unreasonable to expect a bill of lading by the twelfth of March, he also testified that he had known of bills of lading to come in from the western shipping points in eight or ten days. The point of this was whether plaintiff's tender on March twelfth was timely or premature, for upon this turned the question whether the commencement of this action on March 14, 1917, was premature. If there had been no contradiction in the testimony, and if all the inferences pointed to the fact that in the ordinary course the bill of lading would not arrive from the west until after March twelfth, the learned trial justice would have been warranted in deciding as a matter of law whether the plaintiff waited a reasonable time before making its demand and tender, but here was a conflict in the testimony and it might readily have been inferred and found as a fact by the jury that in the ordinary course it would not take a bill of lading more than twelve days to come through the mails from any western shipping point. It was, therefore, error for the court to dispose of this question of fact as one of law and dismiss the complaint on the ground that the action was prematurely brought. Furthermore, as the case stood, the question of reasonable time for the arrival of documents was one of minor importance, for the lead was never shipped at all and the defendants stood chiefly upon the alleged repudiation of the contract by the plaintiff, consisting of its alleged announcement of refusal to accept western lead, as to which there was a sharp conflict of testimony.



Whether the defendants had a right to revoke their declaration of intention to ship lead from Newark, instead of from the west, in the absence of any evidence showing that plaintiff acted upon the declaration, is not necessarily involved, and is, therefore, not decided.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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JEROME UHL, Respondent, v. JAMES GAYLEY and CHARLES A. HENDERSON, Appellants.

First Department, February 21, 1918.

**Pleading — action founded on breach of contract cannot be sustained as action in tort — evidentiary matter contained in pleading not considered on demurrer — complaint stating cause of action for breach of contract.**

Where a complaint, when stripped of improper allegations of matters which are evidentiary, is plainly intended to be based upon the breach of an express contract, it is error for the court to sustain the complaint on demurrer as one in tort based upon a breach of duty by the defendants as trustees.

Complaint containing evidentiary matter improperly pleaded analyzed, and held, to state a cause of action for breach of contract and that a demurrer thereto should be overruled.

APPEAL by the defendants, James Gayley and another, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 9th day of November, 1917, overruling demurrers to the amended complaint and denying defendants' motion for a judgment on the pleadings.

*Henry B. Gayley*, for the appellants.

*William S. Haskell* of counsel [*Henderson Peck* with him on the brief; *William S. Haskell*, attorney], for the respondent.

SHEARN, J.:

The question is whether the complaint states a cause of action. The action is plainly intended to be based upon the breach of an express contract. As a result of pursuing the bad practice of attempting to plead all of the evidence in the case, the cause of action has been so obscured and complicated that the learned justice at Special Term, in an endeavor to give the plaintiff the benefit of all of the inferences to which he is entitled on demurrer, concluded that the complaint might be sustained as one in tort, based upon the breach of duty by the defendants as trustees. That was not the theory of the action, and there was no legal warrant for transforming the action from one on contract to one in tort. In an action for breach of an express contract, the sufficiency of the complaint must be determined as in an action on contract and not as if the cause of action were in tort. If there were anything left of the science of pleading, this complaint would be promptly held to be insufficient. Apparently, however, it is the duty of the court to endeavor to sift out from the maze of evidentiary matter sufficient allegations of fact to constitute a cause of action. Dealing with the complaint in this spirit, eliminating unnecessary allegations, and giving the pleader the benefit of inferences properly to be drawn in his favor, we find that it has been substantially alleged: That between December, 1908, and April 12, 1909, the defendants entered into an agreement with one Alden B. Starr, whereby the defendants agreed to purchase and Starr agreed to sell certain patents and patent rights for the sum of \$20,000 par value in fully paid non-assessable capital stock of a corporation called Single Service Package Corporation of America, duly organized under the laws of the State of New Jersey; that on or about April 12, 1909, said Starr in pursuance of said agreement, at the request of the defendants, assigned and transferred to said corporation all his right, title and interest in and to the aforesaid patents and patent rights, and thereafter, prior to January 1, 1912, the defendants, although said stock was at all times either in their possession or under their control, failed and refused to deliver the same to the said Starr, although delivery thereof was duly demanded, to the damage of said Starr in

the sum of \$14,800; that prior to the commencement of this action said Starr, for a valuable consideration, duly assigned and transferred to the plaintiff his cause of action for the aforesaid breach of contract. .

These allegations are somewhat concealed in unnecessary verbiage, but, when thus stated, it must be apparent that they constitute a cause of action.

All of the complicated allegations in the complaint to the effect that the defendants and one Turner were trustees of a syndicate and that the defendant Henderson executed an assignment of stock to Starr, and that two of the directors signed an acknowledgment that they held the stock for Starr and agreed to issue it to him when they distributed the stock of the corporation as trustees, and the like, are purely evidentiary and were doubtless merely calculated to show that the defendants were able to deliver the stock. It is as a result of the presence of these unnecessary statements of evidence that the defendants have been able to build up a forceful argument that the suit is against the defendants as trustees, under a void executory contract made by two of three trustees, and that, therefore, no cause of action is stated. Nevertheless, as indicated above, there can be sifted out a plain cause of action against the defendants for breach of their joint contract, and for this reason the order should be affirmed, with ten dollars costs and disbursements, with leave to each defendant to withdraw the demurrers and to answer on payment of said costs.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to each defendant to withdraw demurrer and to answer on payment of costs.

OSCAR BAMBERGER and FERDINAND LOEB, Respondents, v.  
ALFRED B. COOKE and Others, Appellants.

First Department, February 21, 1918.

**Deposition — examination of defendants before trial — suit to impress trust and for accounting — plaintiffs must establish right to accounting before examination of defendants as to income received from securities — securities as to which examination is required must be specified — practice — order for examination should not refer to moving papers.**

Plaintiffs suing defendants for a decree declaring that they hold certain stock as trustees for the plaintiffs and for an accounting thereof, are not entitled to an examination of the defendants before trial as to the dividends and income of the stock until they have established their right to an accounting.

In any event the examination of the defendants before trial should be limited to specified stocks and securities, and an order which permits an unlimited and roving examination concerning any of the securities dealt in by the defendants is improper.

Where the plaintiffs contend that the stocks and securities were stolen from them and delivered to the defendants they should specify in their moving papers what specific stocks and securities were stolen.

It is improper for the court to order an examination of the defendants concerning matters referred to in specified folios of the affidavit upon which the order is made, when the folios in the original and printed papers are different, so that it is impossible to ascertain from the papers on appeal the matters to which the examination is limited.

The practice of framing orders for examination before trial so that they read "concerning the matters set forth in the annexed affidavit," or "concerning the issues in this action," is improper.

APPEAL by the defendants, Alfred B. Cooke and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of January, 1918, granting a motion for their examination before trial.

*Edgar J. Bernheimer* of counsel [*Hollander & Bernheimer*, attorneys], for the appellants.

*Ralph Wolf* of counsel [*Hays, Hershfield & Wolf*, attorneys], for the respondents.

SHEARN, J.:

This is an appeal by the defendants from an order for their examination as limited at Special Term. The complaint alleges in substance that the plaintiffs were in 1917 and are the owners and holders "of certain stocks, bonds, securities and cash;" that "the same" were stolen from the plaintiffs and were delivered to the defendants who received "the said stocks, bonds, securities and cash" without consideration and with notice that plaintiffs were the owners and holders "thereof." Judgment is demanded that it be adjudged that the defendants hold "said stocks, bonds, securities and cash" and the dividends, interest and income therefrom or the proceeds thereof as trustees for the plaintiffs and account therefor. The order allows an examination concerning the allegations of plaintiffs' ownership, the theft, the receipt by the defendants, and lack of consideration, notice and concerning the dividends and income received therefrom. As to the dividends and income, the plaintiffs are clearly not entitled to any examination until they have established the right to an accounting. As to some of the other matters, an examination would be entirely proper if, under the complaint and affidavits, it could be directed and limited to any specified stocks, bonds or securities. The difficulty is that there is nowhere any such specification and the order would permit an unlimited and roving examination concerning any and all of the innumerable securities dealt in by the defendants. The plaintiffs should have specified either in their complaint or in the affidavit upon which the order for examination was made, the stocks, bonds and securities that were alleged to have been stolen from them and delivered to the defendants. Allegations of this vague and general nature do not constitute a sufficient statement of facts showing the relevancy and necessity of the examination. While examination of parties before trial is, as it should be, liberally allowed in furtherance of justice, care must be taken to see that it is not made unnecessarily vexatious and oppressive. That is the sole reason for requiring a statement of facts showing the necessity for the examination.

The order appealed from presents a question of practice which should be referred to. The original order for examina-

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tion requires the defendants to "submit to an examination and testify concerning the matters set forth in the annexed affidavit, and concerning the matters, material and necessary to support the allegations of the complaint, put in issue by the answer herein." The order of the Special Term limits the examination "to the matters referred to in folios 13 and 14 of the affidavit upon which order was made." As the folios in the original papers and in the printed papers are different, it is impossible to ascertain from the papers on appeal the matters to which the examination was limited and the matters to which it was allowed. The difficulty was resolved in the instant case by counsel agreeing and setting forth in their briefs the matters included in the examination, according to their interpretation of the order.

The practice of framing those orders for examination so that they read "concerning the matters set forth in the annexed affidavit," or "concerning the issues in this action," is improper. It leads to innumerable motions and appeals, otherwise unnecessary, to obtain a modification of the order in order to procure a proper limitation of the examination. It would save much time, both of counsel and the courts, if the practice were followed of specifying in the order for examination, directly and not by reference, the matters concerning which the examination is to be had.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the order for examination vacated, without prejudice to a renewal of the application upon sufficient papers.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and order for examination vacated, without prejudice to renewal upon sufficient papers.

HENRY HEBERTON GOOD and Others, Suing for the Benefit of EDMUND W. BODINE and Others, Appellants, v. MATILDA BROWN, Respondent, Impleaded with MARTHA G. SIMPSON and Others, Defendants.

Second Department, February 8, 1918.

**Ejectment — possession — limitation of action — pleading — defense of statute taken by defendant subsequently served.**

In an action of ejectment the possession of the defendant may be both a question of fact and of law.

In an action of ejectment a defendant owning the fee, who was brought into the action by the service of an amended summons and complaint after other defendants had been served, may plead the Statute of Limitations by alleging the lapse of twenty years "before the commencement of this action," although she does not assert the statute "as to this defendant."

Such defendant was not affected by the prior service on others not united in interest with her.

APPEAL by the plaintiffs, Henry Heberton Good and others, from a judgment of the Supreme Court in favor of the respondent, entered in the office of the clerk of the county of Richmond on the 19th day of July, 1912, upon the verdict of a jury rendered by direction of the court in an action for ejectment.

*William M. Mullen*, for the appellants.

*William D. Gaillard*, for the respondent Matilda Brown (daughter).

PER CURIAM:

The proceedings in the Land Office had resulted in a grant to Robert Brown, in which the Bodines were parties remonstrant. Brown's acts of occupation and possession were unmistakably those of ownership toward the Bodines and plaintiffs' privies in interest. Indeed, before this land grant, Brown had been improving the lands with active assistance from the Bodines in the way of lumber and material, without objection.

Possession may be both a question of fact and of law. The verdict on the ground of the Statute of Limitations was fully supported.

This ejectment action was started as to the original defendants on October 21, 1908. The grant by the Commissioners of the Land Office had been on October 26, 1888. Matilda Brown, the daughter, who had the fee since 1902, was brought in by service of amended summons and complaint on February 13, 1909. In her answer she pleaded the lapse of twenty years "before the commencement of this action," without saying "as to this defendant."

Appellants urge here that this did not plead the continued running of the statute after October 21, 1908, when the other defendants were served. But as to her there was no action until she had been named in the summons and served. Her plea must be read with section 398 of the Code of Civil Procedure, that such a defendant is unaffected by prior service on others not united in interest with her.

The Statute of Limitations is a protection against claims under ancient grants, where time has made it hard to fix precise boundaries. When neighboring occupants are improving their lands without objection (and even with active aid as builders), such questions should be asserted while the parties are alive. Failing to do so, their belated claims are rightly outlawed after twenty years.

The judgment is, therefore, affirmed, with costs.

JENKS, P. J., THOMAS, RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment affirmed, with costs.



JENNIE CARR, as Administratrix, etc., of EDWARD J. CARR,  
Deceased, Appellant, v. FREDERICK GOTTSCHALDT,  
Respondent.

Second Department, February 8, 1918.

**Master and servant — negligence — death by fall from scaffold —  
Labor Law — requirement that guardrail of scaffold be bolted  
— failure of master to comply with statute — erroneous charge.**

Section 18 of the Labor Law requires the guardrail of a scaffold to be "properly bolted, secured and braced," and where in an action to recover for the death of one who fell from a scaffold it is admitted by the master that the guardrail instead of being bolted in its socket was tied with rope, it was error to submit to the jury the question as to whether the guardrail was properly attached in compliance with the statute.

Section 18 of the Labor Law has a purpose beyond declaring the common-law obligation of a master, and its specific requirements must be complied with. Proof of a violation of the statute is sufficient to establish negligence of the master as a matter of law.

Such erroneous submission constitutes reversible error where the plaintiff claims that when her intestate fell from the scaffold he had hold of the guardrail and might not have fallen but for the fact that it was not secure.

APPEAL by the plaintiff, Jennie Carr, as administratrix, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Richmond on the 23d day of November, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of November, 1916, denying plaintiff's motion for a new trial made upon the minutes.

*Sidney J. Loeb* [*Leon M. Prince* with him on the brief],  
for the appellant.

*John G. Clark*, for the respondent.

JENKS, P. J.:

I think that it was error to submit to the jury the question whether the guardrail of the scaffold was properly attached thereto in compliance with section 18 of the Labor Law. Whatever expressions in the charge may be isolated and then

read to the contrary, it is plain, both from the tenor of the main charge and from its final word, that the learned court did make the submission.

There was no question whether the said section applied to the scaffold as then in use. That section prescribed that the guardrail of the scaffold must be "properly bolted, secured and braced." The undisputed testimony of the master himself established that the guardrail, instead of being bolted in its sockets, had been tied by pieces of rope. There was no contention that this statutory requirement did not apply to the adjustment of the guardrail in the sockets. The defendant had testified that he had tied the rail into the eyebolts because that was the only way it could be done, but this conclusion was not sustained by his testimony or by that of any other witness. The only explanation of the practice of tying is found in his statement that as the scaffold was shifted the guardrail must have enough play to avoid the fire escapes on buildings. The court in one part of its charge, where it said, "Was this guardrail properly attached? I leave that to you to say," added: "Gottschaldt says that this scaffold was properly secured and braced, and he says that it was bolted fast as it could be; that you could not have it rigid."

I think that upon this record there was no question for the jury whether the master had complied with the statute. I think that this section 18 has a purpose beyond declaration of the common-law obligation of a master. Instead of committing the construction of the guardrail to reasonable care, it prescribes, in further assurance of safety, that the guardrail must be properly bolted, secured and braced. In the nature of things a bolt — a strong pin — secures rigidity. Bolting is a specific requirement as distinguished from the general requirement of securing and of bracing. And the statute is not satisfied if bolting, when and wherein required, is omitted, no matter how properly the guardrail is secured and braced. The master could not satisfy this specific requirement of the statute by substitution, even though he exercised due care in selection of the substitute. The proof of the violation of the statute in this case was sufficient to establish as matter of law the negligence of the

master in furnishing the scaffold. And neither court nor jury had any power of dispensation upon consideration of the care exercised by the master in otherwise securing or bracing this guardrail.

In *Marino v. Lehmaier* (173 N. Y. 536), HAIGHT, J., for the court says: "In Comyn's Digest, under head of Actions on Statutes (F), page 453, it is said: 'So in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to said law.' (See, also, *Pitcher v. Lennon*, 12 App. Div. 356; *McRickard v. Flint*, 114 N. Y. 222, and *Hover v. Barkhoof*, 44 N. Y. 113.)" In *Pitcher v. Lennon*, cited in *Marino's Case* (*supra*), the court, per O'BRIEN, J., say: "These and many more cases that might be referred to support what we must regard as the well-settled doctrine, first, that if one upon whom the statute imposes a duty violates that duty, and the violation results in an injury, he is liable, irrespective of all questions of care and prudence." As was said by HOTCHKISS, J., for the court in *Coleman v. Ruggles-Robinson Co.* (159 App. Div. 273; *affd.*, 213 N. Y. 683): "The measure of defendant's duty was not due care, for the statute cast upon the defendant the burden of compliance with its terms." And the learned judge well observes that otherwise there would be no reason for the statute inasmuch as reasonable care was required by the common law.

I think the request that the court instruct the jury that from the uncontradicted evidence in the case there was a violation of the law, in that it appears affirmatively here, and uncontradicted, that this guardrail was not bolted, was proper. (*Foster v. People*, 50 N. Y. 598; *Zabriskie v. Smith*, 13 id. 322; *Ryan v. Manhattan R. Co.*, 121 id. 137; *Chapman v. McCormick*, 86 id. 479.) In *McDonald v. Long Island R. R. Co.* (116 N. Y. 551), BRADLEY, J., for the court says: "Although the question of negligence is dependent upon facts which must go to the jury, when any inference may arise from the evidence either to support or defeat the charge, there may be a state of facts so unqualified as to justify the determination of the fact as matter of law."

The possible effect of this error upon the plaintiff's case

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cannot be disregarded. It was the plaintiff's version of the casualty that at the time her intestate fell from the scaffold he had hold of the guardrail with one hand, and but for the play of the guardrail he might not have fallen from the scaffold. There was evidence that justified this version, and this version in turn afforded basis for the contention that if the guardrail had been bolted it would have been rigid. Indeed, the defendant had testified: "Well, it has got to give both ways; when it is raised and lowered it has to have enough play and room to give; that is the reason we use the ropes on it."

The judgment and order are reversed and a new trial is granted, costs to abide the event.

THOMAS, MILLS, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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HORACE L. KENT, Respondent, v. GEORGE H. FRASER,  
Appellant.

Second Department, February 8, 1918.

**Practice — trial — indefinite postponement because absent witness is in Germany.**

A motion for an indefinite postponement of a trial on the ground of the absence in Germany of a material witness calls for an exercise of discretion by the trial court.

The trial court did not err in an exercise of discretion by denying the defendant's motion for an indefinite postponement of trial where the moving affidavits allege that the absent witness was a resident of Berlin when the present war was declared and is believed to be in Germany, etc., and that it is impossible to communicate with him, there being nothing to show where the witness is or whether he is still alive.

APPEAL by the defendant, George H. Fraser, from an order of the Supreme Court, made at the Kings County Trial Term and entered in the office of the clerk of the county of Kings on the 14th day of December, 1917, denying his application for an indefinite postponement of the trial on the ground of the absence in Germany of an alleged material witness.

*Almet Reed Latson*, for the appellant.

*I. R. Oeland*, for the respondent.

JENKS, P. J.:

The motion called for an exercise of discretion by the trial court. (*Paine v. Aldrich*, 133 N. Y. 544; *Whitney v. Whitney*, 76 Hun, 585; *Smith v. Alker*, 102 N. Y. 87.) As the question before us is whether the order made was right (Baylies N. T. & App. [2d ed.], 404, citing *People v. New York Central & H. R. R. Co.*, 28 Hun, 546), we shall not discuss the process by which the learned court reached its conclusion. It appears from the affidavit of the moving party that when the present war between this country and the German Empire was declared, the absent witness was a resident of Berlin, Germany, and, as the affiant is informed and believes, the witness is now in Germany or in the service of the German government and in its army.

It does not appear where the witness is, or, unless the presumption of life applies, whether he still lives. The affiant further states that the testimony of the witness cannot be taken by mail and that it is impossible to communicate with him. Such "utter occlusion" is natural to the state of war, and it must be considered that it will continue during the war. (*The Rapid*, 8 Cranch, 155, 161; *Griswold v. Waddington*, 16 Johns. 438, 471, 482, per KENT, C.) We think that the learned court did not err in an exercise of the discretion reposed in it, and that the order should be affirmed. (*Lowenstein v. Greve*, 50 Minn. 383; *Carberry v. Burns*, 68 Miss. 573. See, too, *Cahill v. Hilton*, 31 Hun, 114.)

The order is affirmed, with ten dollars costs and disbursements.

THOMAS, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

WILLIAM K. DICKERSON, Respondent, v. ERIE RAILROAD  
COMPANY, Appellant.

Second Department, February 8, 1918.

**Carrier — transportation of live stock — Interstate Commerce Act — oral contract for transportation in violation of Federal statute — estoppel — shipper cannot take advantage of reduced rate and repudiate uniform contract authorizing same — erroneous charge — new trial.**

Where schedules filed by a common carrier under the Interstate Commerce Act show its charges for transporting live stock and provide for a uniform bill of lading, fixing a reduced rate at which it will carry live stock, while a rate ten per cent higher is charged if a consignor refuses to execute a "uniform live stock contract," both the shipper and carrier are bound to know that an oral contract for transportation fixing no rate or valuation of the stock is a violation of the Federal act. Hence a consignee whose live stock died in transit because they were not unloaded during ninety-eight hours of transit cannot recover more than the amount limited in a uniform bill of lading upon the contention that said bill of lading was executed without authority and that the agent of the consignor made an oral contract of shipment which fixed no rates. This, because in such case the Interstate Commerce Act and the schedules and bills of lading filed and issued in pursuance thereof would become ineffective.

Moreover, the plaintiff cannot have the reduced rate and disclaim the contract authorizing such rate, otherwise he would be obtaining a discretionary rate and gaining for a lesser charge the benefits of the higher charge.

It was error for the court to charge that the jury might find the oral contract alleged by the plaintiff, for if such oral agreements could be sustained the door is open to all manner of special contracts departing from the schedules and rates filed with the Interstate Commerce Commission.

Although the jury might have found that an agent of the carrier denied the person accompanying the live stock an opportunity to unload them during transit, the error in the charge aforesaid allowing the jury to find the oral contract alleged by the plaintiff requires a new trial.

APPEAL by the defendant, Erie Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 28th day of October, 1916, upon the verdict of a jury, and also from an order entered in said clerk's office on the 8th day of November, 1916, denying defendant's motion for a new trial made upon the minutes.

*Elbert N. Oakes* [*Thomas Watts* and *John Bright* with him on the brief], for the appellant.

*J. F. Halstead*, for the respondent.

THOMAS, J.

The plaintiff caused horses to be shipped from Indianapolis to Goshen, N. Y., where upon arrival February twenty-third, two horses were found dead, and others injured, for which he has recovered a verdict. There was a uniform live-stock contract and also a way bill. The plaintiff, after purchasing, assembled the stock at the stables of the Cooley-Frey Horse Company, who appear as the consignors to plaintiff as consignee. The uniform live-stock contract was signed by such company, by Luther Bear, its cashier. The plaintiff paid the freight mentioned in the way bill and appropriate under the contract, and recited in his written notice of damage, dated February 25, 1913, that the Cooley-Frey Horse Company was the consignor. After the arrival at Goshen plaintiff knew that the Cooley-Frey Company was the consignor in the way bill. Indeed, Helfner, who accompanied the shipment, delivered the contract to Lunney, plaintiff's partner, at Goshen. But in this action the plaintiff insists that he and his partner Lunney in person made an oral contract for the shipment with Reynolds, the agent of the initial carrier, without any participation by the apparent consignor or its representatives, and that neither of them ever saw Frey, who, representing the Cooley-Frey Company, was concerned in the directions in the way bill, and that such company or its agent was unauthorized to execute the contract. Three persons in the defendant's employ testified that Frey was present with plaintiff and actually arranged for the shipment. It was planned that Epstein should accompany the car, and he signed the release indorsed on the contract, but remitted the position to his cousin Helfner, who rode in the caboose, but, as he testified, visited and provided for the horses three times each day. The animals had sufficient feed and water, but were not unloaded during the ninety-eight hours of transportation, to which plaintiff ascribes the injury. Helfner states that he was in the act of unloading the horses for the statu-

tory five hours' rest at Salamanca, but that the defendant's agent there prevented it. The agent testified that Helfner said that he did not wish to unload, but wanted feed and water, which were furnished. If the testimony of Geraghty, Reynolds and Tevebaugh, the agents and clerks of the contracting carrier at Indianapolis, supported by the payment of the stipulated freight rate and the notice of claim be accepted, the Cooley-Frey Company not only had authority to make the contract, but did in fact, through Frey, arrange its terms in the presence of plaintiff, and was responsible for the direction in the way bill, "Do not unload unless absolutely necessary," which is in furtherance of the oral directions of Frey, and would, under the charge of the court, prevent recovery unless the immediate custodian of the stock asked to unload at Salamanca and was denied by the agent at that place. But the testimony of plaintiff and Lunney is to the effect that they in behalf of the shipper were the only persons present, and that there was no written contract, and that Reynolds advised them that the horses would be twice unloaded *en route*. To this must be added the testimony of Helfner that he was prevented from unloading. If it were the usual question of fact, it could not be said that the verdict is against the evidence. But the whole matter must be viewed in the light of the Federal law. The spirit of such law, so far as here applicable, is that there must be common opportunity for all shippers. The carrier proffers terms by filing with the Interstate Commerce Commission schedules of charges for transportation, and "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." (*Boston & Maine Railroad v. Hooker*, 233 U. S. 97, 114.) Such is section 6 of the Interstate Commerce Act, as amended by section 2 of the Hepburn Act (24 U. S. Stat. at Large, 379, 380, chap. 104, § 6, as amd. by 34 id. 584, 586, chap. 3591, § 2; 34 id. 838, Res. No. 47). Such schedules were duly filed by the present initial and connecting carriers. They show charges, and a uniform bill of lading. If the plaintiff shipped, or must be deemed to have shipped, under



the uniform bill of lading, its liability is one thing; otherwise it is something else. The schedules provide a uniform live-stock contract. If one ships under that, the rate is lower than if he does not. The scheduled rate covering the present service was 56 cents per 100 pounds. That is the rate the carrier charged in this instance. It is the rate the shipper paid. It is the rate shown in the way bill. It is a rate that required a uniform live-stock contract. It is a rate that limited the shippers as to value. Such a contract was made with the consignor — the person the plaintiff acknowledged as consignor. Now the plaintiff denies that such person was consignor and that it had the right to make the contract, and relies on an oral contract fixing no rate. But the plaintiff cannot have the rate and disclaim the contract, and unless he expressly agreed to pay a higher rate, the lower rate prevails and in such case the uniform live-stock contract obtains, whether it was or was not actually executed. Otherwise, plaintiff is obtaining a discriminatory rate, and gaining for the lesser charge the benefits of the higher charge. The schedule filed with the Interstate Commerce Commission provides (Rule B): "Unless otherwise provided in this classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of the Uniform Bill of Lading (see pages 23 and 25). If consignor elects not to accept all the terms and conditions of the Uniform Bill of Lading, he should so notify the agent of the forwarding carrier at the time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of the Uniform Bill of Lading in order to secure the reduced rate." The plaintiff was bound to know the traffic rules, and if he made no election he fell under the limitations of the uniform contract. The traffic rules provided: "Agents will be expected to thoroughly familiarize themselves with the following, and will take particular care to acquaint consignors, or their agents, with the requirements of the Company before accepting Live Stock for Shipment." Then follows this: "† Live Stock will be taken at the reduced rates fixed in the tariff only when a Uniform Live Stock Contract is executed by the station agent and the consignor, and when the release

on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a Uniform Live Stock Contract, the live stock will be charged ten (10) per cent higher than the reduced rates specified herein, provided that in no case shall such increase be less than one (1) cent per hundred pounds." The "†" "Denotes Changes other than reductions or increases" in the rate. Rule 1 (C and D) are as follows: "(C) Property carried not subject to all the terms and conditions of the Uniform Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of the Uniform Bill of Lading in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be ten per cent (10%) higher (subject 'to a minimum increase of one (1) cent per one hundred pounds') than the rate charged for property shipped subject to all the terms and conditions of the Uniform Bill of Lading (see Note).

"(D) When the consignor gives notice to the agent of the forwarding carrier that he elects not to accept all the terms and conditions of the Uniform Bill of Lading, but desires a carrier's liability service at the higher rate charged for that service, the carrier must print, write or stamp upon the Bill of Lading a clause reading: 'In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law, but subject to the terms and conditions of the Uniform Bill of Lading in so far as they are not inconsistent with such common carriers' liability.'" The plaintiff in effect discards the Hepburn Act and the Carmack Amendment (24 U. S. Stat. at Large, 379, 386, chap. 104, § 20, as amd. by 34 id. 584, 593, 595, chap. 3591, § 7; 34 id. 838, Res. No. 47)\* which requires a bill of lading to be issued. (*Adams Express Co. v. Croninger*, 226 U. S. 491.) The instance of decision under the act of an unauthorized contract, leaving the shipment with no contract, save an oral agreement to ship

\* Since amd. by 38 U. S. Stat. at Large, 1196, 1197, chap. 176, and 39 id. 441, 442, chap. 301.—[R.E.P.]

with no rate and no valuation given, is not brought to attention. The carrier did not so understand the undertaking, but the jury has found it. But the shipper as well as the carrier must be deemed to know that such an oral arrangement was a violation of the Carmack Amendment, which requires a bill of lading, a departure from the posted and filed schedules, and that the rate given and accepted was such that the carrier's obligation was only that contained in the uniform live-stock contract. If a shipper may deny that by himself or through another authorized he was privy to a shipping contract, or bill of lading, and that there was but a mere agreement to ship with no rates fixed, and a jury may sustain his contention, the Hepburn Act and Carmack Amendment and schedules and bills of lading filed or issued pursuant to them become ineffective. And yet it has been the Federal policy to create a system that would comprehend transportation in its infinite varieties, and reduce to systematic regulation the relation of carriers and shippers through the entire country. Thereby the initial and connecting carriers become as one to the shipper — a consummation of the utmost concern and convenience to the public. In *Georgia, Florida & Ala. Ry. v. Blish Co.* (241 U. S. 190, 195), quoting from *Kansas Southern Ry. v. Carl* (227 id. 648), Justice HUGHES wrote: "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the Act [Interstate Commerce Act, § 20, as amd. by Hepburn Act and Carmack Amendment] as measured by the original contract of shipment so far as it is valid under the act." The opinion further declares (p. 197): "The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." How much less may the shipper contend that by agreement with the shipper, or by mutual consent or connivance, the Federal act was not observed and the shipment arranged as if it did not

exist, and no schedules filed pursuant to it. The shipper may not disclaim knowledge or notice of the statute or schedules filed under it. His knowledge is based on the terms of the bill of lading and the published and filed schedules, and the "lawful rate is that which the carrier must exact and that which the shipper must pay.'" (*Boston & Maine Railroad v. Hooker*, 233 U. S. 97, 111.) To the same effect is *Kansas Southern Ry. v. Carl* (227 U. S. 639, 653). That was said relative to the value declared by the shipper. But where there is a rate made, and carriage under it, and payment of it made, and it is such as under the schedules demands a certain valuation, and a contract with terms appropriate to that rate, the shipper may not by a plea of ignorance of law, schedules, contract and bill of lading recover a value that is assured by a different rate. In *Cincinnati & Tex. Pac. Ry. v. Rankin* (241 U. S. 319, 328) the opinion states: "But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him." In the present case the bill does not contain the alternate rates, but it states the rate charged and paid, and the posted and filed schedules show that it entitles the shipper to a recovery for loss limited to that rate, and that it requires the terms and obligations of a uniform bill of lading, or uniform live-stock contract. In *Atchison, etc., R. Co. v. Robinson* (233 U. S. 173), after horses were shipped and the car started, the carrier's agent presented the shipper a printed contract made in conformity to the schedules filed with the Interstate Commerce Commission, but without calling his attention to its contents, or informing him thereof, and without proving assent thereto, although he executed it. The opinion states: "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. [*Great Northern Ry. v. O'Connor*, 232 U. S. 508.] To give to the oral agreement upon

which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. [*Kansas Southern Ry. v. Carl, supra*, p. 652.] To maintain the the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act. The Supreme Court of the State in this case affirmed the instruction of the trial court upon which the case was given to the jury, and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred." Any privilege not provided for in the schedules is unlawful discrimination, as an agreement to expedite a shipment of horses by a particular train at regular rates (*Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155), where it was said: "That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and

accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. [*Texas & P. Railway Co. v. Mugg*, 202 U. S. 242.]” The court charged that the plaintiff could not recover if the plaintiff made the contract. I think that the court should have charged that the plaintiff was bound by such terms as enter into the contract, whether or not he authorized the Cooley-Frey Company to execute it. But even so, the defendant would be liable if it prevented the plaintiff from performing his stipulation to look after and to unload stock, as the Cruelty to Animals Act (34 U. S. Stat. at Large, 607, chap. 3594) requires. There is no provision in the bill of lading that the stock shall not be unloaded, but that it shall not be unloaded unless absolutely necessary. The agent of the shipper was exercising at Salamanca his discretion to unload, and the defendant's agent had notice of that, and if the jury found that he denied opportunity, he interrupted an attempted observance of the Federal act. And that must be the conclusion whether there was or was not a uniform contract signed, or the notation made on the way bill by plaintiff's consent. But it cannot be known whether the jury found that the defendant was liable because the contract was not made, or because the man was prevented from unloading, or both. But if the plaintiff is amenable to a uniform stock agreement, the valuations provided in the schedules filed must be observed. Hence, for the two horses that died the recovery must be limited to \$100 each, and for the injury to the other horses the recovery must be as the ratio of the stipulated to the real value. There should be a new trial.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

JAMES GRAY, as Trustee in Bankruptcy of NATHAN CORNMAN and ABRAHAM KENNEDY, Bankrupts, Appellant, v. SAMUEL ROSENDORF and Others, Individually and as Administrators, etc., of DANIEL ROSENDORF and Mrs. HUGO D. ROSENDORF, Respondents.

Second Department, February 8, 1918.

**Partnership — advance of moneys secured by a mortgage to further enterprise to develop lands and share in profits — when such agreement constitutes copartnership — bankruptcy — evidence — testimony of admitted perjurers — new trial.**

Profits promised to a stranger to the business of a copartnership for the use of money to be used in the partnership do not make him a partner. But where such third person and the members of the partnership draw articles in which they expressly say that they form a partnership to develop and improve certain real estate and each contributes land for the sites of buildings to be erected and each agrees to pay a share of the expenses, debts and obligations and is to receive an equal part of the proceeds and income, and the members of the former partnership are expressly authorized to represent and act for said third person, a partnership exists for the specific enterprise in spite of the fact that the repayment of the money contributed by the person joining in said enterprise is secured by a mortgage on the lands.

Where the members of the prior partnership, on their bankruptcy, testified that a conveyance of their interest in said lands to the new partner participating in the real estate enterprise was made in good faith, but after their discharge and on the appointment of a new trustee in bankruptcy testified that their conveyances to the new partner were designed to defraud creditors, so that they are confessed perjurers, their testimony in a suit brought by the trustee in bankruptcy to set aside the conveyance is useful only for the purpose of discovery or explanation of independent facts.

On all the evidence, *held*, that there must be a reconsideration of the case in view of the present holding that the agreement of the parties constituted a partnership and that a new trial is necessary.

APPEAL by the plaintiff, James Gray, as trustee, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 3d day of May, 1916, upon the decision of the court after a trial at the Kings County Special Term.

An appeal is also taken, as stated in the notice of appeal,

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from the decision of the court and from the findings of fact and conclusions of law.

*Alvin Theo. Sapinsky* [*Abraham H. Simon* with him on the brief], for the appellant.

*Peter P. Smith* [*John F. Clarke* and *Max Altmayer* with him on the brief], for the respondents.

THOMAS, J.:

Nathan Cornman and Abraham Kennedy and Charles Cornman were copartners. Charles retired, and the others conveyed on March 16, 1908, to Samuel Rosendorf, defendant, and his father Daniel, now deceased, by several deeds, all real estate held by them as copartners or individually, and on April 16, 1908, Cornman and Kennedy were adjudged bankrupts upon a petition filed against them on March 30, 1908. No assets were found, and on August 11, 1909, they were discharged after the usual inquiry, in which Kennedy, Cornman and Samuel Rosendorf testified to the good faith of the conveyances. On July 15, 1915, the proceedings were reopened and later the present trustee was appointed. The revival of the bankruptcy proceedings was based on statements of the bankrupts to the effect that the conveyances to the Rosendorfs were fraudulent and that Samuel Rosendorf was a partner of the bankrupts in the ownership and improvement of six lots on the northeast corner, and six lots on the southeast corner of Livonia avenue and Chester street. The questions are: (1) Whether Samuel Rosendorf was a copartner with Cornman and Kennedy as to the Livonia-Chester street lots, so as to make them appropriable to the debts of the firm; (2) whether the conveyances were fraudulent as to creditors. Inasmuch as the present testimony of Cornman and Kennedy shows that they are perjurers now, or were such in the bankruptcy proceedings, their statements are useful only for the purposes of discovery or explanation of independent facts. The principal fact so disclosed is that there was an agreement made March 28, 1907, between them and Samuel Rosendorf, which determines whether they were or were not copartners. The introductory stipulation in it is so wide in scope and so direct in expression that by itself it permits but a single



conception, viz., that the three men became copartners for the purpose of building twelve houses on the land; that the interest of each should be an undivided one-third part; that Rosendorf should contribute "*at least*" \$19,000 in such installments as Cornman and Kennedy "may deem proper during the construction of the said buildings," and that Cornman and Kennedy should contribute "as much more as may be necessary," not exceeding \$19,000. The next sentence precisely fits the provision for a partnership by the stipulation that each party shall bear "an equal one-third part of all the expenses thereof, and \* \* \* all debts or obligations incurred therein, and each to receive a one-third of the proceeds thereof or income therefrom." Thus far a partnership agreement in perfection appears, limited, however, to a single adventure. The next paragraph deals with the event of the completion of the buildings. Then Rosendorf should receive conveyance of an undivided one-third interest in the premises, and satisfy a mortgage thereon given at the date of the agreement by Cornman and Kennedy to secure the payment of \$19,000. As between the three men, the agreement is that the consummation of the partnership undertaking, that is, the construction of the buildings, followed by conveyance to Rosendorf of one-third interest, shall earn the discharge of the mortgage given to secure the conditional payment of \$19,000 capital contributed by Rosendorf. Pending such completion, each man remains a partner, with his contribution at the risk of the venture, save that if it fail of reaching the stage of completed construction the interests of Cornman and Kennedy must bear Rosendorf's loss to the extent of \$19,000. But at all times, before or after completion, Rosendorf promises that he will bear one-third part of the expenses "thereof," the quoted word referring to the construction of the buildings, and the same proportion of all debts or obligations incurred "therein," the last quoted word referring to the enterprise, and it is stipulated that he shall receive one-third of the proceeds and income, which means the land and buildings, the increment in value, and rents, interest and the like. There are five further provisions, (1) that "this partnership" shall not conflict with the private and disconnected business of either party, and shall relate only to the premises named;

(2) that Cornman and Kennedy "will do and perform any and all acts necessary and proper for the speedy completion of said building;" (3) that the agreement shall continue until the premises "shall have been completed and sold or equitably divided between the parties," and shall thereupon cease; (4) that Cornman and Kennedy are empowered to do any act and to conclude any necessary instrument without Rosendorf's written consent; (5) that Rosendorf shall receive one-half of the "cash invested by him," which may be received by Cornman and Kennedy on the sale of the premises, and that the balance of the "proceeds and amount invested realized on such sale, including mortgages, shall be divided in such manner as may be deemed proper." If Rosendorf should receive one-half of \$19,000, it would make his contribution equal to that of each of his partners, whose maximum contribution was stated at \$19,000. The balance of the proceeds would then be divided according to the interests of the partners. The ensemble of the agreement shows that in the construction of the building the parties were partners equal in interest and usufruct, and that to that end each was pledged to the expense; that upon completion of the buildings Rosendorf should have one-third of the premises only, but not his mortgage, and that if at any time there should be sale, there should be an adjustment, whereupon the agreement would cease. The mortgage referred to in the agreement also was dated March 28, 1907, and accords with a building agreement of the same date, both not filed or recorded until January 11, 1908. In form they are a building loan agreement and mortgage. Both recite a bond. Another important instrument, dated and executed the same day, supplements the documentary evidence of the acts and relations of the parties. It is a deed from Rosendorf to Cornman and Kennedy of his interest in the premises, which had been conveyed to the three parties by deed dated August 23, 1906, Rosendorf contributing \$1,000 of the purchase money. That indicates that the parties did not intend to be tenants in common. Does such history show that Rosendorf was a partner as to creditors of the partnership? I repeat that the salient terms of the agreement are that the parties combined to build houses on land in which each had a one-third ownership, which interest should continue in

the same proportion, with liability for debts, expenses and obligations in the same ratio, with similar right to income, the land itself or proceeds, which must include profits, if any there should be, with equal contribution of money for capital, if necessary, save that in the first instance Rosendorf should contribute as much as the possible maximum of the other two; to be equalized, however, from the first avails, if sufficient. But dominating all that was the right of Rosendorf to enforce the mortgage given for the \$19,000 contribution conditionally upon his not receiving conveyance of one-third of the premises upon the completion of the buildings. Does Rosendorf's right to enforce that mortgage overlie the rights of creditors, whom he agreed to pay at least to the extent of one-third of their claims? Cornman and Kennedy are authorized to go forward and buy and to build. In terms it is expressed that there may be debts and obligations incurred. They are made agents to do all things necessary for the achievement of the undertaking, and defendant agrees that he will pay one-third of the debts. Rosendorf cast all his contribution into the fortune of the enterprise with the single chance of salving some portion by enforcing his mortgage for \$19,000, which was not necessarily his entire contribution, in case he did not receive conveyance after completion of the buildings. If he did receive such conveyance, his whole interest partook of the peril of the enterprise. If he did not receive it, he had a lien to the extent of \$19,000 on all the capital, which was superior to all rights of his copartners, but not to the rights of creditors. But the enforcement of the mortgage did not terminate his interest in the assets. If the property showed an excess over the mortgage, he was entitled to share in it, after satisfying the contributions of the other partners. If, then, the project went to successful accomplishment, Rosendorf would get one-third of the profits in the whole of the property, and he agreed to pay one-third of the debts and obligations, and so necessarily one-third of the losses, if there should be such rather than profits. Rosendorf was not assured that he would receive what he contributed. If the buildings were completed and an undivided one-third conveyed to him, there was the chance of a loss or of a gain, and whether the buildings were or were not completed he was always entitled to a one-third

interest in the premises. Until the relation ended by the completion of the houses and conveyance of his share to Rosendorf, or adjustment on sale of the property, there was absolute community of interest in the fate of the undertaking, principal, loss, or profit, or income, with such protection to Rosendorf as the mortgage afforded, and the acting and patent partners were authorized by that relation as well as by the expression of the agreement to create obligations for the purposes of the undertaking. The completion of the buildings would fulfill the project; nothing would then remain save to make division by the simple method of conveying to Rosendorf an undivided one-third of the land and adjusting the usual equities obtaining among partners. Rosendorf's position must be (1) that he could have one-third of the capital; (2) one-third of all income; (3) one-third of the profit arising from increment in value or from proceeds of sale over cost and maintenance; (4) that he was not liable for any demands for the labor or material that the building involved, or that entered into the creation of the improvement of property in which he shared. For instance, he authorized Cornman and Kennedy to buy bricks for the building, if necessary. Assume that they did so. Out of the bricks and other material in whole or in part grew the houses, in which he had a one-third interest, from which might issue a profit to him. And yet his position is that he could take, not only one-third of the houses, but all of them, and divert them from the materialmen who had not filed liens, and be himself quit of all obligation, and the reason given is that if one-third of the houses were not conveyed to him he could enforce security for his contribution to the capital. It remains to be considered whether decision sustains such position. It may be remarked that the court should hesitate to decide that the parties were not copartners, when the foremost term of their agreement declares that they are such. *Leggett v. Hyde* (58 N. Y. 272) introduces a series of decisions. Hyde agreed with the members of a firm "to invest" money in its produce business in which his son was to be employed "on trial for one year," and to share one-third of the profits during such time, to be settled half-yearly — "then, if agreeable to both parties, shall be admitted as a partner in the business by making a

further investment, if necessary." Hyde was deemed a partner as to creditors of the firm. The opinion states: "The prominent and important facts are, that he loaned the firm a sum of money to be employed as capital in its business, and that, therefore, he was entitled to have and demand from it one-third of the profits of its business every half-year." The opinion presents as a prominent consideration "that whatever person shares in the profits of any concern, shall be liable to creditors for losses also, since he takes a part of the fund, which in great measure is the creditor's security for the payment of the debts to them." There was no stipulation that Hyde's investment should be returned to him, but that would result if it was not lost in the venture. Then follow a number of decisions to the effect that an arrangement, whereby money contributed to an enterprise for the use of which the lender was to have a share of the profits, merely provided a method of compensation, but did not create a partnership. The cases are considered and distinguished in *Hackett v. Stanley* (115 N. Y. 625). There Stanley loaned Gorham money, for the payment of which with interest Gorham gave his note, secured by a policy of life insurance and a chattel mortgage, and in consideration of that and for services Stanley was to render in securing sales in the business, and for further money he should at his option advance, Gorham agreed to divide with him the yearly net profits of the business in which the money should be used and render quarterly statements. Either party could withdraw his advance with interest, and Gorham, as the active man, was allowed a salary. It was noticed by the court that the services promised (wherein the case at bar is different), moneys advanced and to be advanced, constituted consideration for the agreement for the division of profits. It was decided that the liability did not depend upon the intention of the parties in making the contract to shield themselves from liability; that the profits were not a measure of compensation, but for a proprietary interest in the profits as compensation for money advanced and time and services bestowed, and that the parties were partners as to third persons. In *Demarest v. Koch* (129 N. Y. 218) Spaulding agreed to secure title to a piece of land subject to a mortgage, and also to procure a builder's loan for \$50,000 thereon and

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to erect two houses to be finished by a certain day. Koch agreed to furnish one-half of the money in excess of the building loan necessary to construct the building. Upon completion Spaulding agreed to convey to Koch one of the houses, "subject to the lien of an equal half of the two mortgages; or, in case the parties should elect to sell the land and buildings, that she would pay Koch one-half of the net price received on such sale," and as the contract stated, "it being the intent of the parties to equally divide any profits which may be realized by the sale of said buildings." The performance of the agreement by Spaulding was secured by a mortgage on the property. The contract, as the court analyzed it, was that Koch should advance half of the necessary money, and that Spaulding should erect the houses and convey one to Koch, and that "all that is said in relation to a sale of the property or a division of the price received is conditional upon the further agreement of the parties," and so the relation of partners did not exist. Koch's statement, so interpreted, was to advance some money and have one house, without personal exposure to debt. Between the last two cases noticed and *Leggett v. Hyde* (*supra*) there are decisions on which the respondents rely. In *Curry v. Fowler* (87 N. Y. 33) two men named McCormack and Fowler made an agreement which showed that the McCormacks were the owners of land, whereon they were about to erect fifteen buildings, and Fowler agreed to advance \$50,000 towards such building and was to have interest thereon and one-half of the profits on sale, which the McCormacks guaranteed at at least \$12,500, and the advances and guaranteed profits were secured by bond and mortgage on the land. It was decided that the agreement did not make Fowler liable to third persons as a partner upon the ground that Fowler merely made a loan relating to a building contract, and that the profits were a means of compensation. The lender had no title or ownership in the building, nor did he stipulate to bear any part of the debts, as in the case at bar. The court found authority in *Richardson v. Hughitt* (76 N. Y. 55), where Hughitt and B. Bros. & Co. agreed that the firm should make some wagons and deliver them to Hughitt, who agreed to advance \$50 on each, and upon sale Hughitt was to receive one-quarter of the profits and his

advances with interest. The provision for profits was considered merely a mode of providing compensation for the use of money advanced. Hughitt was a mere factor advancing on the thing to be sold. The decision was like that in *Eager v. Crawford* (76 N. Y. 97), where C. advanced to G. money to purchase stock and fixtures for a business, and payment on demand was secured by a chattel mortgage on the property, and G. agreed to pay C. one-half of the net receipts of the business. C. was not liable as a partner, and the legal presumption was that the share of the receipts so to be paid was to be applied in payment of the loan. The case was distinguished from *Leggett v. Hyde* (*supra*) upon the ground that the money was loaned and was to be refunded absolutely without regard to the profits. In *Cassidy v. Hall* (97 N. Y. 159) the first parties made a contract with a company, which showed that they contemplated assuming control of it when, if ever, they should be satisfied that its business was profitable, and that it was expedient to make an arrangement to determine that question, and thereupon the first parties, to enable the company to fill orders for goods made by it, agreed to make advances upon the assignment of such orders as they should approve, to collect on the orders, and from the proceeds retain the advance with interest and a proportion of the profits, not less than ten per cent of the face of the orders. The company gave the first parties a chattel mortgage upon its property to secure the advance. The first parties were not liable as partners to third persons for goods sold the company. I notice finally *Mason v. Partridge* (66 N. Y. 633), where Partridge and Whitney entered into an agreement by which Partridge should furnish to Whitney \$2,000 to be used in a business which Whitney was to conduct, paying cash only, and Partridge not to be liable beyond \$2,000, and each to have one-half of the profits. It was decided that Partridge was a partner as to third persons lending Whitney credit, with knowledge of the limitation, disregarded to Partridge's knowledge. With such survey of the decision, it is easily perceived that profits promised a stranger to a business for the use of money loaned to be used in it, would not make him a partner; but where he and others conclude articles and in them say that they form a partnership, and each contribute

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land for the site of buildings to be erected, and each agrees to pay a share of the expenses, debts and obligations, and to receive an equal part of the proceeds and income, and two are in words authorized to represent and to act for the third, the mere fact that, if the undertaking does not escape its hazards, one partner may collect to a fixed sum his contribution, should not prevail. The transfer of all the real estate proximate the bankruptcy, the suppression of the partnership agreement, and the testimony given by Rosendorf and others to conceal and to deny the partnership, are evidences of fraud; but as there must be a reconsideration of the case in view of the present conclusion that there was a partnership, the questions in issue can be decided more justly on a new trial.

The judgment is reversed and a new trial granted, costs to abide the final award of costs.

JENKS, P. J., MILLS, RICH and PUTNAM, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM ROACHE and All Other Persons Similarly Situated, Appellant, Respondent, v. JAMES M. CARTER, Superintendent of State Prisons, and Others, Respondents, Appellants.

Second Department, February 8, 1918.

**Crime — commutation, compensation and paroles — chapter 358 of the Laws of 1916 — questions relating to construction of said statute not determined on mandamus granted to discharge convict — academic question — rights of convicts similarly situated will not be determined — deductions from term of sentence cannot be earned by convict on parole.**

The court on a writ of mandamus granted on the relation of a person convicted of crime will not determine whether the so-called Compensation Act (Laws of 1916, chap. 358) allowing a convict certain deductions from his time of imprisonment for efficient and willing performance of duties assigned to him is retroactive if it appears that the relator has



actually been released from confinement so that he is without any actual grievance.

Moreover, the court will not direct the Superintendent of State Prisons and others to meet to parole all convicts entitled to parole under said statute on a petition for mandamus made by a single convict for the redress of his own grievance and those of other convicts similarly situated. *It seems*, that under said statute a convict is not entitled to compensation by deduction from his time of imprisonment during the period he is on parole, for during such period there can be no efficient and willing performance of duties assigned to him within the meaning of the statute. The court will not suggest how the prison authorities should make up a table so as to allow to a convict the number of days' deduction he has earned by willing performance of duties.

Apparent contradictions in said statute relating to the question as to whether it is retroactive should be corrected by the Legislature.

CROSS-APPEALS by the relator, William Roache, and by the defendants, James M. Carter, as superintendent, and others, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 17th day of December, 1917.

The relator appeals from so much of said order as denies his prayer that chapter 358 of the Laws of 1916 be declared retroactive and that the compensation provided by it shall date from the commencement of the term of imprisonment of each convict. The defendants appeal from so much of said order as directs that a peremptory writ of mandamus issue commanding them to meet and allow to this relator and all other convicts similarly situated certain compensation.

*Benjamin Fagan*, for the relator.

*Edward G. Griffin*, Deputy Attorney-General [*Merton E. Lewis*, Attorney-General, with him on the brief], for the defendants.

THOMAS, J.:

The record shows that the Superintendent of Prisons, by affidavit under date of October 9, 1917, admitted that the relator was eligible for parole on December 21, 1917. This is in answer to relator's petition verified October 13, 1917, which states that relator was entitled to go before the Parole Board in September, 1917, and to be discharged on

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October tenth. The Special Term on December 17, 1917, granted a writ of mandamus directing the defendants forthwith to meet and to allow the relator and all other convicts similarly situated "the compensation provided by statute, computed and based upon an allowance of ten days within every thirty-day period for willing and efficient performance of duties assigned to them," if entitled to it, and to reckon the compensation by thirty-day periods, not excluding Sundays or holidays. Appeal from the order was taken by both parties, the relator because the order does not declare the Compensation Act (Laws of 1916, chap. 358) to be retroactive, and the defendants because all the order is deemed erroneous. And yet, when the appeal came on for argument in January, 1918, the relator was presumably released and was without actual grievance. What question related to him, then, is there for decision? What convicts are similarly situated? What is denied them? Why should a mandamus run in their favor? No concrete thing is disclosed. The defendants are entitled to a modification of the order so far as it directs them to assemble and parole all entitled convicts. Courts cannot so direct officers to act on the convicts in mass upon the petition of a single convict, who has no community of rights, and who reveals rather imperfectly his own complaint, but gives no details of their plight. It is evident that the parties are seeking the opinion of this court concerning a way to execute the statute. For, upon the argument the relator stated that the worthy convict is entitled to ten days' compensation in each thirty days. The Attorney-General agreed to that. That is what the statute declares. Both parties advise the court that Sundays and holidays are to be reckoned with the days of service. Where, then, is the question? Is it not plain that, if the convict is allowed ten days in every thirty, the time will come when his days actually served, with the compensatory days, will equal the limit of his service? Upon the argument, there was difficulty in learning at what date the relator would have been entitled to go out, if credited with ten days in each thirty well served. The court should be informed of the precise right denied, and what exact thing is wrongfully taken away. The difficulty is that the relator is not satisfied to take ten days in each thirty served, but

insists also on ten days in each thirty elapsing while he would be on parole. That is, parole time is made to earn a reduction of the imprisonment that precedes it. For instance, starting with the year 1917, through which a sentence would run, if the convict by serving satisfactorily for the first nine months would earn a discharge on October first, the relator would insist that he also be credited with ten days for each thirty-day period thereafter, and so entitled to a discharge some thirty days earlier than the first of October. But subdivision 3 of section 230 of the Prison Law (Consol. Laws, chap. 43; Laws of 1909, chap. 47), as amended by chapter 358 of the Laws of 1916, declares that a convict "may also earn in each period of thirty days, \* \* \* in further reduction of his or her definite sentence, or in reduction of the minimum term \* \* \*, as compensation for efficient and willing performance of duties assigned to him or her, not to exceed ten days in any such thirty-day period in which the duties assigned are performed in the manner above specified." A person already released from prison cannot thereafter reduce his sentence by efficient and willing performance of duties assigned to him. The construction suggested by the relator is so obviously illogical and erroneous that it requires no discussion. On the other hand, if through convenience a table has been prepared that does not work out for each convict an exact ten days for each thirty days well served, the table is wrong, and it is not the duty or purpose of the court to suggest how it should be fashioned. Indeed, the prison authorities should be quite qualified to observe aptly the statute. The relator also suggests that under the statute he was entitled to credit for time satisfactorily served before chapter 358 of the Laws of 1916 went into force. He bases this contention upon the language of subdivision 3 of section 230 of the Prison Law, as amended by chapter 358 of the Laws of 1916, which provides that he could earn ten days' compensation in each period of thirty days, "counting from the day when his or her imprisonment began." That refers to a convict confined at the time the act took effect who is subject to the jurisdiction of the parole board and to any convict thereafter received in the prison. But the section thereafter gives the same compensation to a convict "now confined who is subject

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to the jurisdiction of the parole board, from the time this section as hereby amended takes effect." So the section has opposite statements. The counsel for the relator contrasts this provision with that in subdivision 2, which, as he states, refers to prisoners who have definite sentences, and provides that "Any such convict may also earn in each period of thirty days of the unexpired term, counting from the day on which this section as hereby amended takes effect." The Attorney-General points out that if the relator's contention prevails, a convict serving not less than twenty or more than forty years' sentence since 1897 should have credit from the time he entered the prison until his minimum sentence expires, although the board that would pass upon the question of his efficient and willing performance of duties has been changed. It is sufficient to say at this time that there is no evidence before the court that any person is aggrieved, or that there are any facts or circumstances requiring the court to take action, even if the statute be regarded as retroactive. It would seem to be the function of the Legislature to correct what appears to be a contradiction.

The order should be modified so far as it relates to convicts similarly situated, and as so modified affirmed, without costs.

JENKS, P. J., PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Order modified so far as it relates to convicts similarly situated, and as so modified affirmed, without costs.

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JOSEPH J. CHERNES, Respondent, v. MORRIS ROSENWASSER  
and Others, Appellants.

Second Department, February 8, 1918.

**Malicious prosecution — defense — estoppel — probable cause.**

Where in an action brought against C. and other defendants for malicious prosecution, it appears that the defendants all united to have plaintiff arrested for assault and battery on the defendant C., resulting in an

indictment upon the trial of which the plaintiff herein was acquitted, and that thereafter the defendant C. sued the plaintiff for the same assault and battery, and it was decided that such assault had been committed, the judgment against the plaintiff herein for damages for assault is as to the defendant C. an estoppel, and the fact that the other defendants prompted and aided the defendant C. in prosecuting the plaintiff herein cannot involve them in damages as the validity of such act was established in the action between C. and the plaintiff, and hence they must have had probable cause.

APPEAL by the defendants, Morris Rosenwasser and others, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 10th day of July, 1917, sustaining plaintiff's demurrer to a separate defense.

*Meyer Kraushaar*, for the appellants.

*Solomon S. Schwartz*, for the respondent.

THOMAS, J.:

For the present purposes it must be considered that all the defendants united to have the plaintiff arrested for assault and battery on the defendant Carlomagno, and at an actual trial of the issue before the magistrate the plaintiff was acquitted of the alleged offense; that the defendants prosecuted the charge before the grand jury with a resulting indictment, which was tried in court, and the plaintiff herein acquitted. So there was a final decision between the People and Chernes, the plaintiff, that there had been no assault and battery committed on a third party, to wit, Carlomagno. But before this action was commenced Carlomagno sued the plaintiff, Chernes, for this same assault and battery, and it was decided between the parties that such assault was committed. That established a fact which as between these two parties can never be retried, and so in this action brought by Chernes against these defendants for malicious prosecution, Carlomagno can say that not only did he complain of the assault and had probable cause to procure Chernes' arrest, but that it has been established that an assault did actually take place. The judgment of not guilty in the action by the People against Chernes established nothing against Carlomagno. He was

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not privy to that action or that judgment. Had the court found the plaintiff guilty, Carlomagno could not have offered the judgment of conviction in evidence in an action for assault against Chernes. Nor, in an action by Chernes against Carlomagno for assault, could the judgment of not guilty be used in Chernes' behalf. So there is no difficulty in reaching the conclusion that as to Carlomagno, his judgment against Chernes for damages for assault is an estoppel. But how about the other defendants Rosenwasser? The verdict of not guilty in the criminal action permits the plaintiff to sue them. They were not parties to the action brought for assault by Carlomagno against the present plaintiff Chernes, and yet they are using that judgment as a defense. But look farther and see just what the charge against the Rosenwassers is. It is that Carlomagno prosecuted the plaintiff and that the Rosenwassers prompted and aided him to do it. But if the fact is that the act which Carlomagno did was what he had a right to do because he was assaulted, then the fact that the Rosenwassers prompted him to do a valid and legal act cannot involve them in damages. The validity of that act has been established between the parties to this action, and it cannot be held that Carlomagno did a valid act and at the same time found that the Rosenwassers, aiding him to do the act, had not probable cause to believe that he should do it.

The order should be reversed, with ten dollars costs and disbursements, and the demurrer overruled.

JENKS, P. J., RICH and BLACKMAR, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and demurrer overruled.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
ATTILIO DE SIMONE, Appellant.

First Department, February 1, 1918.

**Trial — distinction between substantial and harmless error — when failure to observe legal rules will not vitiate trial — when exclusion of testimony harmless — criminal procedure — when district attorney exceeds rights in opening address to jury — evidence — remark of bystander as part of *res gestæ*.**

The dividing line between substantial error which calls for a reversal of a judgment of conviction in a criminal action and such error as may be disregarded, depends in large measure upon the conviction in the minds of the reviewing judges of the defendant's guilt.

If from the evidence in the criminal action the defendant's guilt clearly appears, a failure to strictly adhere to legal rules will not vitiate the crime.

While upon a trial for homicide a question to the very young son of the victim, who witnessed the murder, why he had not told the policeman at the arrest of the defendant that he was the man who shot his father, was proper, yet in view of the natural fear in the minds of young children of the officers of the law, his failure to tell the policeman is so immaterial as to be negligible and the exclusion of the testimony is harmless.

A district attorney exceeds his rights when in his opening he states matter as proof of a motive in defendant to commit the crime charged, which he cannot prove, cross-examines defendant on collateral issues to an undue extent, and on issues entirely irrelevant to the question of defendant's guilt of the crime for which he was on trial; but such acts are not prejudicial error calling for the reversal of a judgment of conviction, where the jury was instructed that no motive for the crime had been proved.

Evidence of the remark of a bystander that he, meaning defendant, "ran over Houston street" was admissible as part of the *res gestæ*, the crime and the immediate flight being necessarily linked together.

SHEARN and PAGE, JJ., dissented, with opinion.

APPEAL by the defendant, Attilio De Simone, from a judgment of the Court of General Sessions of the Peace in and for the County of New York, Part V, entered in the office of the clerk of said court on the 31st day of October, 1916, convicting the defendant of the crime of murder in the second degree.

*Frank Moss* of counsel [*Isidor Wels* and *Caesar B. F. Barra* with him on the brief], for the appellant.

*Robert C. Taylor* of counsel [*Edward Swann, District Attorney*], for the respondent.

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SMITH, J.:

On July 25, 1916, Alexander Della Rosa, a native of Italy, was deliberately murdered upon Thompson street, in the city of New York. This defendant has been charged by a grand jury with having committed the crime, and has been convicted by a trial jury. His trial was fairly conducted by the learned trial judge, and to his charge to the jury the defendant's counsel stated in open court that he took no exception. By the verdict of the jury he was found guilty of murder in the second degree, and he has appealed to this court for a new trial, alleging that his guilt was not proven and that he was not tried according to law.

His first challenge to the judgment is that the verdict is against the weight of the evidence. Upon careful review of the evidence, I am of opinion that the record contains abundant evidence to sustain the conviction. In the first place, he is charged with the commission of the crime by two eye-witnesses. One Menichino, sixty-five years of age, saw the defendant fire the fatal shots. One of the shots, without intention, hit this witness. He knew the man and identified him positively. His evidence is undoubtedly weakened to an extent by some apparent contradictions and by testimony that upon the night of the murder he was confronted by defendant in the presence of two policemen, and then said that he did not know who fired the shots. But this conversation was through an interpreter (not sworn) and when the man was dazed by his own wound, and his apparent hesitancy in answering the questions then asked indicate either that he did not understand or that he was for some reason unwilling at that time to charge defendant. At the trial, however, he was positive in his charge, and the jury might well have believed his evidence then given. The son of the deceased also swore that he saw defendant commit the murder. His testimony is also to an extent weakened by the fact that his testimony differs in some particulars from some other testimony in the case. Whether these discrepancies arose from the use of the interpreter or arose from a confused recollection of the event, he swore positively at the trial to the defendant's crime, and I am not prepared to say that the jury may not have believed that in the main facts his evidence was wholly reliable. I



attribute no importance to the fact that he did not tell the police that night that the defendant was the man who shot his father. He was a very young boy, laboring under intense excitement, and might have been in fear of the officers of the law or of the friends of the defendant in whose midst he found himself, with his father, his protector, dead. His story was consistent both on direct and cross-examination, and the credibility of that testimony was for the jury to judge.

Again, the defendant was immediately before the shooting with his friend De Vito. He came out of the restaurant with him. The murder was committed directly in front of the restaurant. He swears that he turned one way and his friend the other. Almost immediately the shooting took place. De Vito saw the whole affair. He could have cleared his friend if innocent. Why was he not called? The defendant's failure to call his friend, who could have cleared him if he had not fired the shots, was most suspicious, and the jury might have so considered it.

Again, the defendant's conduct when arrested proved his guilt. He ran from the scene. When arrested and asked why, he said, "I heard some shooting." "I am kind of nervous." "Wouldn't you run if you heard shots?" "I did not want to be mixed up in it." Was this the conduct or excuse of an innocent man? But go a step further. When the second policeman came up and asked him why he shot the man he said, "I didn't shoot him; he is a friend of mine." So it now appears that he did not simply "hear some shooting." He had seen his friend murdered in cold blood before his eyes and had run away because "he did not want to be mixed up" in the matter. So much for his declarations. He swore upon the stand that although only a few feet from the place of the murder when he heard the first shot fired he did not look back but immediately ran away, and did not know who was shot, and yet, according to two witnesses, the two policemen, he said when asked why he shot him, that the murdered man "is a friend of mine." Notice, too, that this was to be his defense. When confronted by his dying victim at the drug store, he himself swears he said, "He is my friend." Is it to be wondered that the jury rejected his story?

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Again, after the murder this defendant *at once* ran down Thompson street and up Houston street for about seventy-five feet, when he ran into the arms of Policeman Schachne. It is clearly evident that he alone was running from the scene of the murder. Policeman Schachne had no trouble in picking out the man who was in flight. He went directly for the defendant and halted him. He then led him back four or five feet, when Policeman Harson came up. Harson, who was following him, swears that he saw no one else running. When Harson came up he at once went past the defendant about four feet and picked up a gun, which was still hot. All agree that this was the gun with which the murder was committed. It must have been brought from the scene of the murder by some one quickly who had run to that point. This defendant was the only man running. It was picked up at the exact place at which defendant was arrested. It matters not that the policemen did not see him drop it. They were not watching his hands particularly. He may have carried the gun in his hands, or more likely in his pocket, and when arrested knew well the danger of having the gun found on his person. I say he was the only man running. When a man is running away there are always those who hasten their steps to keep him in sight to see where he may go, and this was apparently the case here. But the man well in the lead was defendant, and so far in the lead that Harson saw no others running. The heated gun was apparently picked up at once, before another could have reached the spot and dropped it. The inference is irresistible. The relentless logic of this heated gun found at the exact spot where defendant was halted in his flight almost immediately thereafter is what has closed the prison doors upon this defendant, and appellate courts are commanded by law not to open those doors except for substantial error committed upon the trial.

The dividing line between substantial error which calls for the reversal of a conviction and such error as may be disregarded, depends largely upon the conviction in the minds of the reviewing judges of the defendant's guilt. If his guilt clearly appears, a failure to adhere strictly to legal rules will not vitiate a trial. It is the duty of courts to see that no innocent man shall suffer. No less imperative is the

duty of courts to so enforce the law that it may prove a terror to evil doers, to the end that the lives of innocent citizens in the future may not be sacrificed.

What, then, are the errors claimed to be sufficient to reverse this judgment?

It is said that the court erred in not allowing the defendant's counsel to ask the boy Luigi why he had not told the policemen at the time of the arrest that the defendant was the man who had shot his father. This question was proper, but in view of the age of the boy, of his shock in just having witnessed his father's murder, of the natural fear in the minds of young children of the officers of the law, his failure to so state to the policemen becomes so immaterial as to be negligible.

It is said that the prosecuting attorney exceeded his rights by stating in his opening, matter as proof of a motive in defendant to commit the crime which he could not prove, and also in cross-examination of defendant on side issues to an undue extent and on some issues which were entirely irrelevant to the issue of defendant's guilt. As a criticism, the claim is good. It is most unfortunate for prosecuting officers to attempt to secure convictions by insisting upon procedure known by them to be irregular. Such a course should be restrained and rebuked by the trial court. As a ground of substantial error, however, the claim of appellant is not good. The object of the evidence was to show motive. The trial court instructed the jury that no motive for the crime had been proven, and in view of this charge, I think the acts of the prosecuting attorney were not so prejudicial as to justify a reversal of the judgment.

Again, it is claimed that substantial error was committed by the admission of evidence of the remark of a bystander that "He ran over Houston street." The policeman was after a man who was running away. That man was identified by that remark, and not the man who committed the murder. But the evidence was admissible as part of the *res gestæ*. The crime and the immediate flight are necessarily linked together. The excitement attending a murder and the escape of the murderer are so intense that the remark was spontaneous or impulsive and unreflecting. It was done before there was

time to contrive or misrepresent. It related to a part of the principal act. Again, the defendant swears that he and many others were running both ways; that some were running ahead and some behind him. If so, the remark could not have served as any identification of defendant. If, on the other hand, as is undoubtedly true, the defendant was the only man who was in fact running away, then he was the man who carried the heated revolver to the spot where he was arrested and where it was found, and his guilt is certain, and the jury was indeed lenient that it did not exact his life as well as his liberty.

The judgment should be affirmed.

CLARKE, P. J., and SCOTT, J., concurred; PAGE and SHEARN, JJ., dissented.

SHEARN, J. (dissenting):

The appellant was convicted of murder in the second degree. The homicide occurred on July 25, 1916, at about seven-fifteen p. m. in front of a coffee house on the west side of Thompson street, No. 169, eighty feet north of the curb of West Houston street, which crosses Thompson street at right angles and runs generally east and west. Sullivan street runs parallel with Thompson street and is a short block to the west. Police Officer Harson, patrolling the east side of Thompson street, about seventy-five feet south of West Houston street, heard several shots, ran north and, as the shots appeared to come from the west side of the street, crossed Thompson street diagonally on the run. In crossing the street there was a wagon going north on Thompson street which blocked his view. Harson crossed behind the wagon and came out on the west side of Thompson street about ten feet north of the northwest corner of West Houston and Thompson streets. At that point, as the sidewalk is seventeen feet wide from the curb to the corner grocery, Harson had a view up Thompson street and west on West Houston street. Someone in the crowd called out, "He ran over Houston street." Harson immediately turned, looked west on West Houston street and saw the defendant about thirty feet ahead of him, running in the street. Harson started in pursuit and when he had run about twenty-five

or thirty feet further, Officer Schachne, who was coming east on West Houston street, from the corner of Sullivan street, stopped the defendant. Harson ran up to them, but before reaching them Officer Schachne had turned the defendant around and started walking him back toward Thompson street. Meeting them, Harson asked the defendant what he was running for and the defendant replied: "Wouldn't you run if you heard shots?" Harson then looked down on the ground and about four feet in the rear of the defendant, that is, towards Sullivan street, saw something lying in the street. He picked it up and found that it was an automatic revolver containing only one cartridge. The revolver was hot, and there is no question but that it was the one used by the murderer. Officer Schachne testified that he was standing on the southeast corner of West Houston and Sullivan streets when he heard several shots that appeared to come from the direction of Thompson street; that he went in that direction towards a number of people and when he was half way down the block saw one man coming west, a man dressed in a grey suit, who was the defendant; that he stopped the defendant and asked him, "What are you running about?" and defendant replied: "I heard some shooting, I am kind of nervous, \* \* \* and when there is any shooting around I don't want to be mixed up in it;" that he turned defendant around and walked him east about three or four or perhaps five feet when Officer Harson came running up and asked the defendant, "What are you running about?" that the defendant replied: "I heard some shooting;" that Harson asked, "What did you shoot that man for?" and defendant replied: "I didn't shoot him, he is a friend of mine;" that Harson then went west about three or four feet, bent down and picked up something and said, "I got the gun. It is still hot." The officers then took the defendant to the drug store on the northeast corner of Thompson and West Houston streets where they found the murdered man, Della Rosa, stretched out on the floor. They took the defendant over to where Della Rosa lay to have him identified but Della Rosa said nothing, being in a dying condition. While the officers were in the drug store with the defendant an old man named Menichino, a pushcart peddler, who had been struck in the

arm by one of the bullets, was brought in, and, on being confronted with the defendant, failed to identify him. It appeared from the testimony of the officers that at the time the defendant was stopped and placed under arrest there were a number of other persons on West Houston street in the immediate vicinity. The murdered man was an intimate friend of the defendant, and no motive for the murder was shown. Clearly, if the defendant's guilt rested upon the evidence thus far referred to, the People's case would have been very weak, for it would have rested upon the two circumstances of flight and the finding of the hot revolver on the ground in the immediate vicinity of the defendant when arrested. Flight standing alone raises no legal presumption of guilt. It has no probative force unless there are facts pointing to the motive which prompted it. It is a circumstance to be considered and weighed in connection with other proof and with that care and circumspection which its inconclusiveness, when standing alone, requires. (*Hickory v. United States*, 160 U. S. 408, 417.) Of course, the pistol might have been dropped by someone of the numerous other persons who were in West Houston street at the time, and it is a significant fact that although the defendant while running west was within the clear view of Officer Schachne, who saw his arms moving back and forth as defendant ran, the officer did not see the defendant drop the pistol; neither did he hear it fall to the pavement, although it must have dropped within a foot or two of the officer if it was dropped by the defendant. Further, Officer Harson, who had the defendant in view as the defendant ran from the point thirty feet west of the corner to the place where he was stopped, did not see the defendant drop the pistol.

The People, however, did not rest with this proof but produced two alleged eye-witnesses of the shooting. One was Luigi Della Rosa, the thirteen-year-old son of the murdered man. The boy testified that he saw his father in front of the coffee cafe talking with the old man Menichino when the defendant and one Genaro Aveto came out of the coffee house with two other men; that Aveto went back into the coffee house and, while standing in the doorway, made a sign to the defendant by winking his eye; and that thereupon the

defendant drew his revolver and fired at Della Rosa, who fell at the first shot; that the defendant fired five or six times more when Della Rosa was lying on the sidewalk and then ran to the corner of West Houston street and up West Houston street toward Sullivan street; that the boy followed defendant and saw Officer Schachne catch him; that when the officer caught the defendant the latter "threw the gun away;" that when the defendant dropped the revolver he had it back of him with both hands on it; that it made a noise when it dropped and that he saw Officer Harson pick it up. The boy testified that he walked back with the officers when they took the defendant to the drug store but that he was not allowed at that time to enter the drug store. A few minutes later, after it was disclosed that he was the son of the man who had been shot, he was admitted, he says, to the drug store; and that the defendant was there and his father was lying on the floor. He said that Menichino was sitting in a chair. On cross-examination the boy testified that when his father fell in the street he ran to help him get up and stopped there for about three minutes and then ran after the defendant. He said that although he was within ten feet of the spot where the defendant was arrested and although he walked back to the drug store in the company of the officers and the defendant he did not tell either of the officers that the defendant was the man who had shot his father. Both of the officers testified that they did not see the boy in West Houston street. The boy also admitted that when in the drug store in the presence of the defendant and while his father was lying bleeding on the floor he did not say to any one that the defendant was the one who had shot his father. He did not tell any one that he saw the defendant shoot his father or drop the revolver until he went to his uncle's house on the night of the murder after his father had been removed to the hospital.

Wholly disregarding the testimony of the defendant's witnesses that the boy was not in West Houston street at the time of the arrest but came up afterwards and inquired who had shot his father, and overlooking the contradiction between the boy's testimony as to defendant's running with both hands behind him and Officer Schachne's testimony that

defendant was pumping his arms as he ran, it is quite incredible that, if the boy had actually seen the defendant shoot his father, he would have failed to tell the officers so when he saw them make the arrest and, particularly, that he would have failed to do so when the defendant confronted the boy's father who was lying bleeding on the drug store floor.

The People further called the old man Menichino, who testified that while he was walking in the middle of Thompson street he felt something strike his arm and turned around and saw the defendant with a pistol in his hand shooting and then saw the defendant run to the corner of West Houston street and up toward Sullivan street. As already noted, Menichino, when questioned by the police officers in the drug store through an interpreter immediately after the shooting, failed to identify the defendant.

Of course the credibility of these two alleged eye-witnesses was for the jury, but, it seems quite plain, the case for the People, as above outlined, was not very strong. The defendant took the stand in his own behalf and denied any connection with the shooting and the only manner in which the People's case was strengthened by the defense was the defendant's resort in some instances to what appears to be falsehood and evasion.

The case has been thus outlined in substance, so far as the prosecution is concerned, not with the notion that it is the function of an appellate court to substitute its judgment upon the probabilities of the case and the credibility of the witnesses for that of the jury, but because of the nature of the errors assigned by the defendant in his appeal. As was said by WERNER, J., in *People v. Hinkman* (192 N. Y. 421, 428): "Thus the most conspicuous fact in the case is that the evidence against the defendant, taken as a whole, was not strong, and yet we cannot say that it was so weak as not to support the verdict of the jury. We emphasize that circumstance because material and substantial errors in rulings can never be overlooked in cases where, as in the case at bar, the chain of evidence may be technically unbroken, and yet be so weak as to yield to the attack of very slight opposing facts or circumstances. Errors committed in such



cases may in themselves be sufficient to balance the scales against a defendant, although they might prove absolutely harmless in cases where the proof is so clear and cogent as to dispel all doubt."

It is earnestly contended on behalf of the appellant that he did not have a fair trial. In support of this, the appellant assigns as error the extent to which the assistant district attorney was permitted to go in cross-examination of the defendant, which, coupled with an opening and damaging statement of motive, as to which there was an utter failure of proof, suggestive questions carrying harmful inferences which were not and could not be established as facts, and a persistent effort to convict the defendant out of his own mouth of a shameful offense in no manner related to the crime charged, was inevitably calculated to create an atmosphere unfavorable to the defendant and to render it easier for the jury to find the defendant guilty.

In opening the case to the jury the assistant district attorney said: "It seems that De Simone for about eight years prior to that time, had been living with a woman named Rosa Vitosa, Rosa having come to him when she was about fifteen years old." Here the defendant's counsel objected with, "The relations of the defendant with this woman, not his wife, some years ago," were incompetent and improper. The court in overruling the objection said: "I think it may be shown as bearing on any possible question of motive." The assistant district attorney continued with his narrative, and a little further on said: "It seems that through some information which the dead man, Della Rosa, obtained he went to the defendant De Simone with the statement that Rosa, his common-law wife, was untrue to him, that Rosa had gone with this De Vito, owner of the cafe, to a place in 27th Street, where she had been known, and where she had had illicit relations with De Vito.

"Rosa, by the way, so far as we can discover, is not only the common-law wife, but is also the *breadwinner of the family*."

Defendant's counsel interposed an objection that the statement was highly improper and that the prosecutor knew that he could not offer such evidence as part of the case in chief. The prosecutor responded: "That is part of the motive, it

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seems to me," and the court said: "I see no objection to that. The district attorney expects to prove that as part of the case." Defendant's counsel then moved for the withdrawal of a juror and the declaration of a mistrial and took an exception to the denial of the motion. No proof whatever was offered as a part of the prosecution's case in chief to establish this alleged or any other motive, although some attempt was made to do so on cross-examination of the defendant. At no stage of the case was there any proof that the defendant was living on the proceeds of this woman's prostitution, which was the plain import of the statement to the jury. Throughout the cross-examination of the defendant a persistent effort was made to keep alive in the minds of the jury this damaging accusation by means of suggestive questions. For example: "Q. Isn't it a fact, Rosy is a prostitute? A. She is not, not that I know of. \* \* \* Q. Don't you know that she has been convicted for prostitution? \* \* \* A. I do not." (No attempt was at any time made to prove a conviction.)

The prosecutor continued his cross-examination as follows: "Q. You are living with a woman named Rosy, aren't you? A. Yes. Mr. Barra: Your Honor, he has answered that. Q. What is Rosy's business? A. No business at all. Q. Isn't it a fact you knew she is a prostitute? A. Not that I know of, no sir. Q. Don't you know that she is a common prostitute upon the streets? A. No, I do not. Q. Doesn't she give you the proceeds of her prostitution? A. She never did. Q. You do not know whether she is a prostitute? A. I do not. Q. You know she has been living with you for eight years without being married to you? A. She was married once. Mr. Barra: That is over my objection. [The Assistant District Attorney]: I ask that counsel should not interrupt. \* \* \* The Court: Objection overruled. Mr. Barra: Exception. \* \* \* Q. Rosy was at one time in a house of prostitution in Twenty-seventh Street, wasn't she, about five years ago? Mr. Barra: I object to that as incompetent, irrelevant and immaterial. The Court: Objection overruled. Mr. Barra: Exception. A. No sir, she was not. Q. Isn't it a fact that within a very short time of the day of the shooting that De Vito had taken her to Twenty-seventh street to a

house of prostitution? Mr. Barra: He has answered that and I object to it as repetition, and on the further ground it is incompetent, irrelevant and immaterial. The Court: Objection overruled. Mr. Barra: Exception. A. No sir, she never goes with anybody. Q. Didn't she go to a house of prostitution on Twenty-seventh street? A. She never did." All of this was over the reiterated objection and exception of the defendant's counsel.

It was of course entirely proper to emphasize the fact, freely admitted by defendant as a part of his direct examination, that he was living with a woman to whom he was not married, but that was vastly different from the charge that the defendant was living with a prostitute, and the infinitely viler charge that he was living on the wages of prostitution. Without a shred of evidence to support either accusation, and knowing that unless the defendant admitted the charge no proof in support of it could be offered on the defendant's trial for murder, the prosecutor not only injected this unwarranted and damaging accusation into his opening but returned to it again and again, suggesting it in so many ways and so persistently that the jury might well have wondered which charge he was being tried for. It was extremely improper to plant the poisonous seed of this infamous charge in the minds of the jury in an opening statement, but if that had been the end of the matter it might possibly be assumed that an intelligent jury would disregard the statement. When, however, it was persisted in throughout the case by a responsible public official, and being of such an extremely damaging nature, it cannot be safely assumed in a case where the evidence of defendant's guilt is of the character previously outlined, that the jury disregarded the accusation and the suggestive questions as mere evidence of excessive zeal on the part of the prosecutor. The trial under such circumstances cannot be said to be fair. Important as is the swift and sure conviction of criminals, of transcending importance is it that every accused person should be afforded a genuinely fair trial. As the Court of Appeals said in *People v. Wolf* (183 N. Y. 464): "Why should court and counsel violate the law in order to enforce it? What a pernicious example is presented when such officers, intrusted with the most important duties, in attempting to punish the guilty,

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are themselves guilty of departing from the law. Charity cannot extend its presumption to shield either in this case without also presuming that both were ignorant of the law. It may be that this warning will be disregarded as others have been, but it will be well for district attorneys and trial judges to remember that errors, such as are now complained of, if raised, as they were in this case, by sufficient objections and exceptions, will, upon appeal to this court, result in the reversal of the judgment of conviction. In no other way can the command of the law be observed and the rights of innocent persons charged with crime be adequately protected. It is not to shield the guilty but to protect the innocent, that courts are steadfast in upholding rules, in force for generations, by which it may be lawfully determined who are guilty."

Again, as said very recently by the Court of Appeals in *People v. Richardson* (222 N. Y. 103), dealing with an improper impeaching cross-examination of a witness for a defendant in a criminal trial, holding the evidence inadmissible and reversing the judgment of conviction: "The reasons for the established rules, which I have stated, forbid the rule urged upon us by the argument of the district attorney. Those reasons are that the evidence which they bar would have a tendency to withdraw and mislead the attention of the jury from the real issue under inquiry and would subject the accused to charges unconnected with that issue and against which he had no reason to prepare. (*People v. Thompson*, 212 N. Y. 249.) In *People v. Sharp* (107 N. Y. 427, 461) Judge DANFORTH said: 'Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought and to excite prejudice and mislead them.' " The accusation and the repeated suggestion that the defendant was living on the proceeds of prostitution certainly had a "tendency to withdraw and mislead the attention of the jury from the real issue under inquiry" and "subject the accused to charges unconnected with that issue and against which he had no reason to prepare." (See, also, *People v. Saitta*, 170 App. Div. 665; *People v. Freeman*, 203 N. Y. 267; *People v. Fielding*, 158 id. 542.)

The defendant's complaint of the over-zealous conduct of

the prosecutor is well founded, and, in the interest of justice, requires a new trial.

Furthermore, the court erred in admitting hearsay evidence.

Over the objection of the defendant, Officer Harson was permitted to testify that when he reached the northwest corner of West Houston and Thompson streets, as he ran to the scene of the shooting, "Somebody in the crowd hollered 'He ran over Houston street.' I immediately turned and looked over Houston street, and I saw the defendant about thirty feet ahead of me running." This remark of a bystander was received upon the theory that it was a part of the *res gestæ*. The district attorney seeks to justify the ruling upon the ground that the bystander's statement was receivable as an introductory matter, which explained why Harson acted as he did (citing *People v. Taylor*, 3 N. Y. Crim. 297, 299; *affd.*, 101 N. Y. 608). The difficulty with this contention is that while the remark might have served such a purpose, it was fairly susceptible of an entirely different significance, fraught with very serious consequences to the defendant, namely, the identification of the defendant as the man who did the shooting. The obvious purpose of the remark was to direct the attention of the officer to the whereabouts of some person whom the officer was seeking. The remark followed so closely upon the shooting that, coming from one in the immediate vicinity of the crime, the plain inference is that the bystander understood that the person whom the officer was seeking was the man who had fired the shots. Under the circumstances, when the bystander said to the policeman, "He ran over Houston street," the statement was equivalent to saying, "The murderer ran over Houston street." At any rate, the statement is fairly susceptible of that meaning, and might have been so interpreted, and, as it seems to me, would have been so interpreted by the jury. Therefore, the admissibility of the statement must be determined as though the bystander had in effect said, "The murderer ran over Houston street." There are numerous cases in other jurisdictions dealing with the admissibility of declarations of third persons identifying the defendant as the person who committed the crime, but no case closely in point is found in this State. The cases are collated by Wigmore in his work on

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Evidence (Vol. 3, § 1755, n. 1, 2), by Chamberlayne in his work on the Modern Law of Evidence (Vol. 4, § 2597) and in Bishop's New Criminal Procedure ([2d ed.], vol. 2, §§ 1085, 1087). In the cases where the matter has been carefully considered and the evidence received it will be found that the declaration was either made within the hearing of the defendant or by actual participants in the acts constituting the *res gestæ*. Such would apparently be the rule in this State, if the sole test to be applied is that of *res gestæ*, for it was held in *Buller v. Manhattan Railway Co.* (143 N. Y. 417) that to make what was said by a third person competent evidence as part of the *res gestæ* proximity in time with the act alone is insufficient; to make it competent what was said must be part of the principal fact, and so part of the act itself; that is, naturally accompanying the act, or calculated to unfold its character and quality. Under this test, the declaration of a bystander identifying the defendant as the person who committed the crime is not within the exceptions against hearsay testimony. In my opinion, however, the last word is not said on the question of the admissibility of such evidence when it is decided that the declarations are not part of the *res gestæ*, for as Professor Wigmore says: "There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth '*res gestæ*,' that it is perhaps impossible to disentangle the real basis of principle involved." (Id. § 1745.) Approaching the question from the point of view of inquiring whether the evidence falls within any well-recognized exception to the rule against hearsay testimony, we find, as Professor Wigmore says (§ 1749), this principle running through all the exceptions, namely, "that the statement must have been made under circumstances calculated to give special trustworthiness to it." In this class are included utterances which may be characterized as "spontaneous," "natural," "impulsive," and "instinctive." As to the admissibility of such evidence, there are certain limitations. The nature of the occasion must be such as to cause "*shock, startling enough*" to produce this nervous excitement and render the utterance spontaneous and unreflecting. \* \* \* The utterance must have been *before there has been time to contrive and misrepresent*. \* \* \* The utterance must

*relate to the circumstances of the occurrence preceding it."* (Wigm. Ev. § 1750.) The remark of the bystander in the case at bar does not come within the exception, from this point of view. It was neither spontaneous nor made under circumstances calculated to give some special trustworthiness to it. Giving the defendant the benefit of the presumption of innocence, to which he was entitled when the ruling was made, it was an entirely possible inference that the remark was made by the person who actually did the shooting and was intended to fasten suspicion upon the defendant, start the police officer in pursuit of the wrong person and enable the guilty person to effect his escape unnoticed. The circumstances do not give the declaration the badge of truth which is the prime requisite to allowing the exception to the rule against hearsay. In such a case as this, where the identity of the person who fired the shots is the vital matter in controversy, and where the character of the case against the defendant is such as indicated in the foregoing résumé of the evidence, it was harmful and reversible error to receive in evidence a declaration of a bystander to the effect, in substance, that the defendant was the one who did the shooting.

The judgment of conviction should be reversed and a new trial ordered.

PAGE, J., concurred.

Judgment affirmed.

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ARTHUR A. HENNING, Appellant, v. ALEX A. CAMACHO,  
Respondent.

First Department, February 21, 1918.

**Costs — action in Supreme Court in Bronx county against defendant served in New York county — Code of Civil Procedure, section 3228, as amended, construed — statutes — repeal by implication.**

Where a resident of the county of Bronx brings an action in the Supreme Court in said county against a non-resident of the State served in the county of New York to recover a balance of \$715 alleged to be due and owing and obtains a judgment for \$450, he is entitled to costs under

subdivision 5 of section 3228 of the Code of Civil Procedure, as amended by chapter 80 of the Laws of 1914.

It was the intention of the Legislature by the amendment of 1914 to subdivision 5 of section 3228 of the Code of Civil Procedure to make the right to tax costs in an action brought in the Supreme Court in Bronx county where the recovery was for \$50 or more, but less than \$500, depend upon whether or not the action might have been brought in the County Court of Bronx county.

When the Legislature made the right to tax costs depend upon whether the action might have been brought in the County Court, it necessarily repealed by implication any statutory provision making such right depend on whether the action might have been brought in the City Court, and intended that if the action could not have been brought in the County Court, costs are recoverable.

APPEAL by the plaintiff, Arthur A. Henning, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 28th day of November, 1917, denying his motion for a retaxation of costs.

*Arthur A. Henning* of counsel [*Max G. Wildnauer*, attorney], for the appellant.

*Louis Jaykowsky*, for the respondent.]

LAUGHLIN, J.:

This action was brought in the month of September, 1916, in the Supreme Court in Bronx county where the plaintiff resided. The defendant was a non-resident of the State but was served in the county of New York. The plaintiff is an attorney and counselor at law and brought the action to recover a balance of \$715 alleged to have been due and owing for professional services with interest thereon, together with costs and disbursements. The defendant appeared and joined issue on the allegations of the complaint and interposed a defense to the effect that the agreement on which the action was based was to answer for the debt, default or miscarriage of another and that no note or memorandum was subscribed by him or in his behalf. The plaintiff recovered judgment for \$450. The clerk refused to tax costs in favor of the plaintiff and based his refusal on the provisions of subdivision 5 of section 3228 of the Code of Civil Procedure and a decision at Special Term in Bronx county in *Hollander v. Kovacs*



(N. Y. L. J., March 17, 1917). The statute creating Bronx county out of part of the former county of New York (Laws of 1912, chap. 548) provided for a County Court in Bronx county but contained a provision (§ 11) to the effect that all acts and parts of acts applicable to the county of New York not inconsistent therewith should continue in full force and effect "as though the name of the said county of Bronx had appeared in said acts and parts of acts." The action is not one specified in either of the first three subdivisions of section 3228 of the Code of Civil Procedure and since the complaint demanded judgment for a sum of money only and the plaintiff recovered \$50 or more he was entitled by virtue of subdivision 4 of said section to costs unless he was precluded from so recovering costs by some other statutory provision. At the time Bronx county was created subdivision 5 of said section 3228 provided, among other things, as follows: "In all actions hereafter brought in the Supreme Court, triable in the county of New York, which could have been brought, except for the amount claimed therein, in the City Court of the City of New York, and in which the defendant shall have been served with process within the county of New York, the plaintiff shall recover no costs or disbursements unless he shall recover one thousand dollars or more." (See Laws of 1910, chap. 574.) The further provisions of subdivision 5 of said section at that time related to the taxation of costs in actions in the Supreme Court triable in the counties of Kings and Albany in which there was a recovery of less than \$500 and to actions in the Supreme Court triable in the counties of New York and Kings and to actions brought in the City Court of the City of New York or the County Court of Kings county which, but for the amount claimed therein, might have been brought in the Municipal Court of the City of New York and in which the recovery was less than \$250. Said subdivision 5 was amended by chapter 80 of the Laws of 1914. By that amendment the 1st sentence of subdivision 5 and the 2d and 3d sentences relating to actions in the counties of Kings and Albany were re-enacted as before; but by that amendment there was substituted for the former provisions relating to actions which but for the amount claimed might have been brought in the Municipal Court the following:

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"In all actions hereafter brought in the Supreme Court, triable in the counties of Bronx and Queens, and in which the defendant is a resident of the county where the action is brought, which could have been brought, except for the amount claimed therein, in the County Court of the counties of Bronx and Queens, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter brought, triable in the Supreme Court or County Court of a county contained wholly within a city of the first class, or in the City Court of the City of New York, which could have been brought, except for the amount claimed therein, in the Municipal Court of the City of New York, and in which the defendant shall have been served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more." (Re-enacted by Laws of 1916, chap. 50.) The jurisdiction of a County Court in such cases depends on the defendant being a resident of the county (Const. art. 6, § 14), and the jurisdiction of the Municipal Court extends throughout the city. (N. Y. City Mun. Ct. Code [Laws of 1915, chap. 279], §§ 14, 151.) Counsel for the appellant contends that the effect of the amendment of said subdivision 5 of section 3228 was to allow a recovery of costs as provided in subdivision 4 in an action brought in the Supreme Court, Bronx county, unless the defendant was a resident of Bronx county and the action, excepting for the amount claimed, might have been brought in the County Court of that county. Counsel for the respondent contends, as I understand his argument, that since the jurisdiction of the City Court still extends to Bronx county, and the defendant was served in the county of New York, the action might have been brought in the City Court, the plaintiff is precluded from recovering costs by the 1st sentence of subdivision 5. That argument is based on the theory that by virtue of said provision of the act creating Bronx county continuing in force all acts and parts of acts applicable to the county of New York not inconsistent therewith "as though the name of the said county of Bronx had appeared in said acts and parts of acts," the 1st sentence of said subdivision 5 is to be con-

strued as if by express provision it related to actions in the Supreme Court triable *either* in New York county or Bronx county and as if it expressly provided that it related to actions in which the defendant shall have been served either in New York county or in Bronx county. That, I think, is an unreasonable and unauthorized construction. Assuming that Bronx county is to be read into the 1st sentence of said subdivision 5 the sentence should, I think, still be construed as limited to cases in which the service of process shall be made in the county in which the action is brought for that is the spirit of the statute as originally enacted. It was intended to relate only to cases where the service was made in the county in which the action was brought. If, therefore, Bronx county is to be read into the sentence that intent should be preserved; and in an action brought in the Supreme Court in New York county the right in this regard to tax costs should depend on whether service was made in New York county, and not in either that or Bronx county, and so in an action brought in Bronx county the right to tax costs should depend on whether service was made in that county and not in either that or New York county. In the case at bar the action was brought in Bronx county and the service was not made in that county but was made in the county of New York and, therefore, I think, the plaintiff was not deprived by the 1st sentence of subdivision 5 of his right to tax costs even if Bronx county was so to be read into it and remained in it when this action was commenced. But any question there may have been with respect to this prior to the amendment enacted in 1914, relating to actions that might have been brought in the County Court of Bronx county, was, I think, set at rest by that amendment. The opinion at Special Term in *Hollander v. Kovacs* on which the county clerk relied and which was reported in the New York Law Journal on March 17, 1917, is based on the decision in *DeLeyer v. Britt* (212 N. Y. 565) reversing on the dissenting opinion of INGRAHAM, P. J., 157 Appellate Division, 586, which holds that the jurisdiction of the City Court still extends to Bronx county; but that, I think, is not the controlling question in the construction of the statute, for while jurisdiction of the City Court still extends to Bronx county that

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county, like all other counties, has a county seat, and whether or not the construction which I have indicated with respect to subdivision 5 be the true construction required prior to the amendment of 1914, it is quite clear that by that amendment the Legislature intended to make the right to tax costs in an action brought in the Supreme Court in Bronx county where the recovery was for \$50 or more but less than \$500 depend on whether or not the action might have been brought in the County Court of Bronx county. There is no City Court held or required to be held in Bronx county; but there is a Municipal Court in every county in the city of New York. Having set up a separate county it was, I think, contemplated and intended that the residents of that county might prosecute their actions without leaving the county, but in order to avoid congesting the calendar of the Supreme Court it was intended to deny the right to costs in an action brought in that court where the recovery was less than \$500, provided the action might have been brought in the County Court. If that be not so then it is difficult to perceive any practical change made by that amendment. If before the amendment costs could not be recovered when the recovery was less than \$1,000 provided the defendant was served *either* in New York or Bronx county for the reason that the action might have been brought in the City Court and that remained the law after the amendment, what substantial change was made by adding *another* reason why costs could not be recovered, for that is practically all that was accomplished by the amendment if Bronx county is still to be read into the 1st sentence of said subdivision 5. When the defendant resides in Bronx county it would be presumed that ordinarily he could be served there and, owing to the provisions of the 1st sentence of the subdivision, costs could not have been taxed unless the recovery was for more than \$1,000. It seems to me that when the Legislature made the right to tax costs depend on whether the action might have been brought in the County Court it necessarily repealed by implication any statutory provision making such right depend on whether the action might have been brought in the City Court and intended that if the action could not have been brought in the County Court, costs are recoverable.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion granted.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted.

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GENERAL FILM COMPANY, INC., Respondent, v. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY OF LIVERPOOL, ENGLAND, Appellant.

First Department, February 21, 1918.

**Pleading — bill of particulars — when affidavit of party applying for bill required — when moving affidavit by attorney insufficient.**

The stringency of the rule requiring an affidavit of a party as a basis for a bill of particulars or other relief has been relaxed to some extent, and particularly when it appears that the attorney was familiar with the material facts and was in a position to make the affidavit quite as well if not better than the client; but the rule has not been abandoned and is peculiarly applicable to a case where the bill of particulars is not necessary to limit the issues, and should not be granted if the plaintiff possesses the information required by the bill of particulars.

Where, in an action to recover for loss under a fire insurance policy, the defendant alleged that the fire occurred while the property was in the possession of a company which the plaintiff, unknown to the defendant had by contract relieved from liability, and that the policy expressly provided that such a contract should constitute a cancellation thereof, a demand by the plaintiff after the service of the answer for a bill of particulars as to the name of the person claimed to have made the alleged contract and when and where it was made should not be granted, solely on the affidavit of one of its attorneys to the effect that he was informed by plaintiff that after diligent inquiry from its officers and employees it was unable to discover that any person in its employ made the agreement, especially where no one familiar with the business of the plaintiff made an affidavit denying the making of the contract as alleged by the defendant or denying knowledge with respect to who assumed to represent it, or his name.

APPEAL by the defendant, The Liverpool and London and Globe Insurance Company of Liverpool, England, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of

New York on the 20th day of September, 1917, granting plaintiff's motion for a further bill of particulars.

*Arthur W. Clement* of counsel [*Wilson E. Tipple* with him on the brief; *Tipple & Plitt*, attorneys], for the appellant.

*William M. Seabury* of counsel [*George Trosk* with him on the brief; *Seabury, Massey & Lowe*, attorneys], for the respondent.

LAUGHLIN, J.:

The action is brought to recover for a loss under a fire insurance policy. The defendant pleaded, among other things, that the fire which resulted in the loss occurred while the property was in the possession of the Exhibitor's Service Company which the plaintiff, unknown to the defendant, had by contract relieved from liability, and that the policy on which the action was brought expressly provided that such a contract should constitute a cancellation of the policy. After the service of the answer the plaintiff demanded a bill of particulars of various items and the defendant served a bill of particulars with respect to some of them. The particulars which the defendant has been required to give are the name of the person who it is claimed in behalf of plaintiff made the alleged agreement with the Exhibitor's Service Company and when and where it was made. The plaintiff in its demand did not request the defendant to give the name of the person who assumed to act for it in making said agreement but only the name of the person who assumed to represent the Exhibitor's Service Company in making the agreement, and the bill of particulars served complied with the demand in that regard.

This, of course, is a proper case for a bill of particulars provided the plaintiff is without information concerning the making of the contract pleaded as a defense. (*Astor Mortgage Company v. Tenney*, 157 App. Div. 361.) No one familiar with the business of the plaintiff made an affidavit denying the making of the contract as alleged by the defendant or denying knowledge with respect to who assumed to represent it or his name. The order was granted solely on the affidavit of one of the attorneys for the plaintiff and is to the effect that he was informed by plaintiff that after diligent inquiry

from its officers and employees it was unable to discover that any person in its employ made the agreement.

The stringency of the rule requiring an affidavit of a *party* as a basis for a bill of particulars or other relief has been relaxed to some extent and particularly when it appears that the attorney was familiar with the material facts and was in a position to make the affidavit quite as well if not better than the client; but the rule has not been abandoned and is peculiarly applicable to a case where the bill of particulars is not necessary to limit the issues, and should not be granted if the plaintiff possesses the information required by the bill of particulars. Here, if the plaintiff made the contract, it is entirely unnecessary that it be informed who acted for it. The only reason for a bill of particulars with respect to who assumed to act for a party in making a contract and when and where it is claimed that the contract was made is to enable the party denying the making of the contract to prepare to meet the evidence which the other party intends to present to charge him with responsibility for the contract. Notwithstanding the fact that some officer or employee of the plaintiff informed its attorney that plaintiff was not aware that this contract was made or who assumed in its behalf to make it, still such officer or employee was not under oath in giving that information and the corporation may know or be able to ascertain from its records and papers that the contract was made and who assumed to act for it, which is all that is required. The record fails to disclose a sufficient reason for the failure to present an affidavit made by some one in behalf of the plaintiff in a position to know what information it possesses in the premises and, therefore, the general rule requiring such an affidavit must be enforced. (*Strohoefer v. Security Mut. Life Ins. Co.*, 148 App. Div. 763; *Stevens v. Smith*, 38 id. 119; *Mayer v. Mayer*, 29 id. 393.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

In the Matter of the Application of WILLIAM G. IHRIG, Appellant, for a Writ of Mandamus Directed to WILLIAM WILLIAMS, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Respondent.

First Department, February 21, 1918.

**Municipal corporations — city of New York — right of taxpayer to inspection of records of department of water supply, gas and electricity relating to bursting of water main in street adjacent to his premises — mandamus — effect of removal of records to another city department.**

A taxpayer, whose premises have been damaged by the bursting of a water main in an adjacent street, is entitled, under section 51 of the General Municipal Law and under section 1545 of the Greater New York charter, to an inspection of the reports of the engineers of the department of water supply, gas and electricity, and all other records, papers and documents relating to the bursting of the main, in order to obtain information or evidence to enable him to prepare for the trial of his action for damages.

A petitioner for a writ of mandamus to compel an inspection of such records should not be required to institute new proceedings because said records have been removed to the law department, as it is within the jurisdiction of the commissioner of the department of water supply, gas and electricity to require their return for the purpose of inspection. But if the commissioner should endeavor to obtain their return in good faith and fail, he should not be punished for contempt, and in that event it might be necessary for the petitioner to proceed against the head of the department to which the records have been transmitted.

APPEAL by the petitioner, William G. Ihrig, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of December, 1917, denying his motion for a peremptory writ of mandamus requiring the respondent to grant him an inspection of certain official records.

*Alexander Holtzoff* of counsel [*Paul Windels* with him on the brief; *Windels & Holtzoff*, attorneys], for the appellant.

*John F. O'Brien* of counsel [*Terence Farley* with him on the brief; *William P. Burr, Corporation Counsel*], for the respondent.



LAUGHLIN, J.:

The petitioner is the owner of premises known as 139-145 Lafayette street, borough of Manhattan, New York, and is assessed therefor. On the 21st of June, 1917, a water main under the jurisdiction of the respondent in the bed of the street adjacent to the petitioner's premises exploded or burst and water therefrom inundated the basement of petitioner's premises causing damages. On the 20th of November, 1917, the day after he verified the petition but before the motion was returnable, he brought action against the city to recover the damages which he alleged were caused by its negligence. The petitioner accompanied by his attorney, prior to instituting the proceeding, made a verbal and a formal demand in writing that the commissioner permit him to inspect the reports of the engineers of the department and all other records, papers and documents relating to the explosion or bursting of the water main, and they were informed by the chief clerk that the demand would not be complied with but that a formal answer would be made thereto. On the same day the commissioner wrote him that the demand had been referred to the corporation counsel for appropriate action. The demand was renewed on November fourteenth and the commissioner thereupon notified the petitioner that for any further information he should apply to the corporation counsel. His attorneys then communicated with the corporation counsel, and receiving no reply within the time specified, instituted this proceeding. It was shown in opposition to the motion that the papers sought to be inspected are reports made by investigators in the department of water supply, gas and electricity and that prior to the return day of the application they had been transmitted to the corporation counsel to enable him to defend said action and were then in his possession. The application was resisted on the ground that the papers were in the possession of the law department and that, therefore, there is no right to inspect them.

We are of opinion that the petitioner as a taxpayer is entitled under section 1545 of the Greater New York charter (Laws of 1901, chap. 466) to inspect the reports of the engineers or investigators of the department of water supply, gas and electricity with respect to the condition

of the water main and cause of the accident. Doubtless his object is to obtain information or evidence to enable him to prepare for the trial of his action, but that is an argument in favor of according to him this statutory right rather than in support of a denial thereof, for it is to be borne in mind that the plaintiff in an action against a municipal corporation is not entitled to an examination before trial pursuant to the provisions of section 872 of the Code of Civil Procedure. (*Uvalde Asphalt Paving Co. v. City of New York*, 149 App. Div. 491; *Davidson v. City of New York*, 175 id. 969; *affd.*, 221 N. Y. 487.) We gave that construction to the provisions of the Code in order to relieve municipalities from annoyance incident to such examinations and the loss of time of their officers and employees that would be caused thereby, and we deemed the construction justified owing to the provisions of section 51 of the General Municipal Law (Consol. Laws, chap. 24; Laws of 1909, chap. 29) and section 1545 of the Greater New York charter which, in effect, authorizes an inspection of municipal records other than those of the police department and law department of the city of New York. The reports of engineers or other employees of a municipality with respect to an accident are not of course evidence against it as admissions or otherwise, but they may afford a litigant information with respect to witnesses that may be material to enable him to prosecute an action and there is no reason why an inspection thereof should not be afforded where he is a taxpayer and thereby comes within the statute. The statutory provisions with respect to this right of inspection are very broad. Section 51 of the General Municipal Law provides that "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this State" are public records and shall be open to inspection of any taxpayer. Section 1545 of the Greater New York charter provides that "all books, accounts and papers in any department or bureau thereof, except the police and law departments, shall at all times be open to the inspection of any taxpayer" subject to regulations with respect to the

time and manner of the inspection; and that in case such inspection is refused the taxpayer may apply to a justice of the Supreme Court for an order allowing the inspection. The records and papers in all departments, with the exception of the police and law departments, are embraced within these provisions which have been held to extend even to a communication made to the department by a third party; and this construction has been given to the statute upon the theory that there are and should be no confidential records or communications with respect to public business. (*Matter of Egan v. Board of Water Supply*, 148 App. Div. 177; *affd.*, 205 N.Y. 147.) On the facts disclosed the reports in question constitute part of the official records of the department of water supply, gas and electricity and the plaintiff is entitled to inspect them. Although at the time of the hearing they had been sent from that department to the law department they are still under the control of the respondent and the petitioner should not be required to institute new proceedings to follow them from one department to another. It is within the jurisdiction of the respondent to require their return to his department for this inspection, and he should do so. Of course if he should endeavor so to do in good faith and fail he should not be punished for contempt and in that event it might become necessary for the petitioner to proceed against the head of the department to which they have been transmitted.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and SHEARN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

In the Matter of Proceedings Supplementary to Execution under a Judgment in an Action Wherein I. NEWTON STREEP was Plaintiff and MICHAEL STREEP was Defendant.

I. NEWTON STREEP, Respondent; MICHAEL STREEP and IGNACE IRVING APFEL, Appellants.

Second Department, February 15, 1918.

**Supplementary proceedings — jurisdiction of justice of Supreme Court to make order for examination of judgment debtor — enforcement of judgment of Municipal Court.**

When a judgment recovered in the borough of Brooklyn in the Municipal Court of the City of New York is docketed with the county clerk of Kings county, it is deemed a judgment of the Supreme Court and may be enforced accordingly, and a justice of the Supreme Court has jurisdiction to make an order for the examination of the judgment debtor in proceedings supplementary to execution.

APPEAL by Michael Streep and another from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 12th day of June, 1917, as resettled by an order entered in said clerk's office on the 19th day of June, 1917, punishing the appellants severally for contempt of court, and also from an order made on the 22d day of March, 1917, referring to an official referee the question of taking testimony thereon.

*Charles Goldzier*, for the appellants.

*A. I. Nova*, for the respondent.

PER CURIAM:

We think that the justice of the Supreme Court had jurisdiction to make the order for the examination of the judgment debtor. When the judgment recovered in the borough of Brooklyn, in the Municipal Court of the City of New York, was docketed with the county clerk of Kings county, it was deemed a judgment of the Supreme Court and it could be enforced accordingly. (N. Y. City Mun. Ct. Code [Laws of 1915, chap. 279], § 131.) The said order made by the said justice in the county of Kings was in enforcement of the judgment. (*Emery v. Emery & Redfield*, 9 How. Pr. 130,

133. See, too, *Friedman v. Metropolitan Steamship Co.*, 109 App. Div. 602.)

The orders should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., MILLS, RICH, BLACKMAR and KELLY, JJ., concurred.

Orders affirmed, with ten dollars costs and disbursements.

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MORRIS KNOBEL and MORRIS BLOOM, Copartners, Engaged in Business under the Firm Name and Style of KNOBEL & BLOOM, Respondents, Appellants, v. LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, a Foreign Corporation, Appellant, Respondent.

First Department, February 15, 1918.

**Insurance — credit insurance — when insurance company not bound by misrepresentations of sales agent — provisions of policy and rider construed.**

An insurance company is not bound by the misrepresentations of a mere soliciting agent who had no authority or discretion as to the terms of policies to be issued, and acted merely as a messenger conveying propositions and counter propositions between the parties and reporting each step for instructions from his principal.

A policy of credit insurance provided that the insured should bear an initial loss of a certain percentage on total gross sales between February 9, 1914, and February 8, 1915, and had attached thereto a rider providing "that the insured shall bear the same percentage of initial loss on the gross sales, shipments and deliveries made between said two dates [September 10, 1913 and February 8, 1914], as the insured bears on shipments during the term of this policy." In an action for loss arising exclusively under the main policy, *held*, that the rider refers only to losses on sales and shipments made prior to the execution of the main policy, which was a renewal and, therefore, the stated percentage on sales prior to said renewal should not be considered in determining the company's liability.

CROSS-APPEALS by the plaintiffs, Morris Knobel and another, and by the defendant, London Guarantee and Accident Company, Limited, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the

11th day of June, 1917, upon the decision of the court after a trial at the New York Special Term.

The plaintiffs appeal from such judgment only in so far as it fails to direct the reformation of a certain policy of insurance and in so far as it fails to award them damages upon the said policy as reformed.

*Theodore B. Richter* of counsel [*Cohen & Richter*, attorneys], for the respondents, appellants.

*William E. Lowther* of counsel [*Lowther, Smith & Russell*, attorneys], for the appellant, respondent.

DAVIS, J.:

The plaintiffs are cloak manufacturers. The defendant among other things is engaged in the business of insuring credits. Plaintiffs allege two causes of action, *first*, to reform a policy of credit insurance and to recover on it as reformed, and *second*, to recover on it in its existing form without reformation.

The third paragraph of the complaint alleges that on the 9th of February, 1914, the parties to this action entered into a contract with each other whereby in consideration of a premium of \$330, the defendant insured the plaintiffs against actual loss to an amount not exceeding \$6,000 in excess of an initial or own loss to be first borne by the plaintiffs, being one per cent (but not less than \$1,750) of the plaintiffs' total *gross* sales and deliveries between February 9, 1914, and February 8, 1915, occurring by reason of the insolvency of debtors between February 9, 1914, and February 8, 1915, on sales of merchandise owned by or consigned to the plaintiffs and shipped and delivered by them between September 10, 1913, and February 8, 1915. The policy was to be issued with the same terms and conditions as were contained in a former policy issued by defendant to the plaintiffs. It is then alleged that the policy in its present form was delivered to the plaintiffs, and that at the time of its delivery the defendant by its agent stated to plaintiffs that it was issued in accordance with the agreement referred to in paragraph 3 of the complaint, and that by its terms and by the terms of the rider attached, the sole initial or own loss to be first borne by the plaintiffs was one per cent

(but not less than \$1,750) of plaintiffs' total gross sales and deliveries between February 9, 1914, and February 8, 1915; that this representation as to the contents of the policy was made by defendant to induce plaintiffs to accept the policy; that plaintiffs, relying upon this representation, accepted the policy without reading it until after its expiration; that during the period covered by the policy the plaintiffs suffered gross losses amounting to \$5,346.75; that plaintiffs have received on account of said losses in dividends \$1,211.51, leaving a net loss of \$4,135.24; that plaintiffs' gross sales for the period between February 9, 1914, and February 8, 1915, were \$286,151.45; that the initial loss to be first borne by the plaintiffs is one per cent of the latter amount, i. e., \$2,861.51, leaving an excess loss of \$1,273.73, for which plaintiffs claim the defendant is liable.

The complaint also alleges that defendant has refused to pay this amount on the ground that under the terms of the policy and the rider the initial loss to be borne by the plaintiffs is one per cent of the plaintiffs' total gross sales and deliveries made between the 10th of September, 1913, and the 8th of February, 1915. It is then alleged that if such is the proper interpretation of the contract of insurance the clauses upon which such interpretation depends were inserted without the knowledge of plaintiffs, either by mistake of the defendant or its draftsman, or were inserted with an intent to deceive and defraud the plaintiffs, and that the policy was accepted by plaintiffs under the belief induced by defendant's false representations that the sole initial or own loss to be borne by plaintiffs was to be one per cent (but not less than \$1,750) of their total gross sales and deliveries made between the 9th of February, 1914, and the 8th of February, 1915. Judgment is demanded also for a reformation of the policy and rider, and for \$1,274.48.

The court was of opinion, and so found, that the plaintiffs had been deceived by the solicitor of the defendant as to the terms of the rider in that he told plaintiffs at the time of the delivery of the policy that plaintiffs were to bear no initial loss on sales and deliveries which had been made prior to the taking effect of the renewal policy on February 9, 1914, but the court refused to reform the contract on the

ground that the defendant's agent was a mere solicitor with no discretion as to fixing the terms of the policy and that these representations of the soliciting agent did not bind the defendant company. Thereupon the court found that plaintiffs' gross losses between February 9, 1914, and February 8, 1915, covered by the contract, were \$5,346.75; that this amount should be reduced by dividends and discounts received, leaving a net loss of \$4,053.79. The court then found that the gross sales between February 9, 1914, and February 8, 1915, were \$288,146.70. To this amount the court added \$15,523.04 of accounts covered and insured under the rider, arriving at a total of \$303,669.74. It then computed an initial loss of one per cent on this latter amount of \$303,669.74, thus holding the defendant liable for \$1,017.10, being the difference between the net loss of \$4,053.79 and the initial loss of \$3,036.69 borne by plaintiffs. The judgment was for \$1,017.10 with interest and costs, and both parties have appealed from the judgment.

As to the reformation of the policy. The evidence shows and the court has found that in the transaction with defendant's solicitor, Morey, the plaintiffs agreed to accept from defendant a policy under which they would bear no initial loss on sales made prior to February 9, 1914. When Morey later delivered the policy plaintiffs asked him if it was in accordance with their previous understanding. Upon Morey's assurance that it embodied the agreement as made, plaintiffs put the policy in their safe without reading it. Nor was it read by them until after its expiration. They then discovered that the terms of the policy had been misrepresented by Morey; that in the rider they were charged with an initial loss on sales made before February 9, 1914. The court has found that under the circumstances the plaintiffs were not negligent in refraining from reading the policy.

The finding that Morey willfully misrepresented the terms of the policy is well established by evidence. The question is whether the defendant is bound by Morey's misrepresentations. The learned court has held that it was not so bound, on the ground that "Morey was merely a solicitor and had no authority to make terms." Morey had no authority or discretion as to the terms of the policy to be issued. He acted



merely as a messenger, conveying proposition and counter-proposition between the parties. Morey's method of conducting the negotiations, reporting as he did, each step for instructions from his principal, indicated to the plaintiffs the meagreness of his authority. He was an agent to solicit business, not to agree upon terms. Therefore, it was entirely outside the scope of Morey's authority either to agree to give the plaintiffs any free coverage or to represent falsely that the policy was so written. We, therefore, think that the learned court was right in refusing to reform the policy on the ground that the defendant was not bound by the misrepresentations of its soliciting agent. However, we think the court erred in arriving at the amount upon which the initial loss of one per cent should be computed. The rider provides "that the insured shall bear the same percentage of initial loss on the gross sales, shipments and deliveries made between said two dates [September 10, 1913 and February 8, 1914] as the insured bears on shipments during the term of this policy." The gross sales made between the two dates mentioned, September 10, 1913, and February 8, 1914, were \$106,790.71. The learned court has disregarded these latter gross sales, and calculated the initial loss to be borne by the assured for sales prior to the renewal upon sales covered by the insurance. It will be borne in mind that not all sales were covered by the insurance. The gross sales were not so covered — only certain sales to parties having a specified financial rating. In doing this we think the court went counter to the provisions of the policy that the initial loss to be borne by the defendant should be calculated upon gross sales. It follows that in using \$15,523.04 of covered sales to arrive at the amount upon which the initial loss was to be calculated the terms of the policy were disregarded.

Both plaintiffs and defendant are dissatisfied with the result arrived at by the learned court. The defendant claims that the initial loss of one per cent to be borne by the plaintiffs should be computed on all gross sales between September 10, 1913, and February 8, 1915, amounting to \$394,937.41. This amount is made up of \$106,790.71 of gross sales during the period mentioned in the rider (September 10, 1913, to February 8, 1914) and \$288,146.70 gross sales during the

period of the main policy (February 9, 1914, to February 8, 1915). In other words, although this claim is for losses arising exclusively under the main policy, the defendant charges the plaintiffs, not alone with an initial loss of one per cent upon gross sales made during the main policy year, but also with one per cent (\$1,067.90) on all sales made between September 10, 1913, and February 8, 1914, the latter date being the beginning of the new period of insurance. By this method of computation the initial loss of one per cent to be borne by the plaintiffs would be \$3,949.37. The net loss as admitted by both parties is \$4,053.79, all of which was sustained on sales made after February 8, 1914. The difference between the net loss and the initial loss as claimed by defendant is \$104.42, which the defendant contends is the extent of its liability.

The result of the construction urged by the defendant is to make the plaintiffs bear an initial loss on sales, etc., covered only for the term of the main policy, computed on gross sales, etc., made both during the period covered by the main policy and that covered by the rider. Thus, although there were no losses on sales covered by the rider, the defendant seeks to decrease its liability on losses under the main policy by charging the plaintiffs with an initial loss of one per cent of gross sales already made during the period covered by the rider in addition to one per cent on the gross sales made during the term of the main policy.

We are not inclined to accept the defendant's interpretation of this contract, as a result of which its liability is fixed at \$104.42. The defendant has no right to use one per cent of the gross sales made between September 10, 1913, and February 8, 1914, in estimating the initial loss to be borne by the plaintiffs on sales made during the term of the policy (February 9, 1914, to February 8, 1915).

The main policy and the rider deal with quite different risks, the former with future sales, the latter with past sales whose merits were known to both sides. For instance, on February 8, 1914, when the renewal went into effect, plaintiffs' outstanding accounts amounted to \$20,399.62. Of these, \$4,876.58 were not covered by the rider. That left \$15,523.04 covered by insurance under the rider. The latter accounts

were gilt edge. In fact all of them were paid when due, and the defendant had offered to carry them free so far as those falling due within two months previous to the renewal were concerned.

It seems reasonable, therefore, as contended by the plaintiffs that the rider makes special provision for past sales and has no reference to future sales referred to in the main policy, and that when it provides "that the insured shall bear the same percentage of initial loss on the gross sales, shipments and deliveries made between said two dates [September 10, 1913, and February 8, 1914] as the insured bears on shipments during the term of this policy," it refers only to losses on sales and shipments made prior to the renewal and not to any transaction made after the renewal went into effect.

It follows, therefore, that as there were no losses on the insured outstandings at the time of the renewal there is no initial loss to be borne by the plaintiffs on them. Had there been any losses on the covered outstandings the plaintiffs would have had to bear the initial loss of one per cent on the gross sales between September 10, 1913, and February 8, 1914, *i. e.*, one per cent of \$106,790.71. But there were no losses on those outstandings, and the initial losses to be borne by the plaintiffs are those arising under the main policy only.

The net loss between February 9, 1914, and February 8, 1915, was \$4,053.79, of which the plaintiffs must bear \$2,881.46, *i. e.*, one per cent of gross sales from February 9, 1914, to February 8, 1915, leaving the defendant liable for \$1,172.33 as prayed for in the complaint. From these considerations it follows that the plaintiffs are entitled to judgment for \$1,172.33.

The judgment should be modified accordingly and as modified affirmed.

An order may be submitted reversing the findings of facts and conclusions of law inconsistent herewith, and embodying findings of fact and conclusions of law in accordance herewith.

DOWLING and SMITH, JJ., concurred; LAUGHLIN and SCOTT, JJ., concurred in result.

Judgment modified as stated in opinion and as modified affirmed. Order to be settled on notice.

MYRON STRAUS, Respondent, v. WANDA MINKOWSKI,  
Appellant, Impleaded with SAMUEL SIMON and Others,  
Defendants.

Second Department, February 21, 1918.

**Mortgage — foreclosure — appointment of receiver — necessity for  
notice of application.**

A clause in a mortgage authorizing the appointment of a receiver upon default does not dispense with notice of the application.

Nor does a clause that upon default the mortgagee may enter the premises, take possession thereof and receive the rents and profits, dispense with the necessity of notice.

A letter written by the attorney for the plaintiff in a suit for the foreclosure of a mortgage to another attorney is not equivalent to notice of an application for the appointment of a receiver, where the authority of the attorney to receive the notice is not established and the letter lacks the requisite precision.

If an order for publication is made on account of the evasion or the absence of the defendant, the appointment of a receiver may be had without notice.

APPEAL by the defendant, Wanda Minkowski, from an order of the County Court of Kings county, entered in the office of the clerk of said county on the 3d day of October, 1917, as resettled by an order entered in said clerk's office on the 12th day of November, 1917, denying said defendant's motion to vacate an order appointing a receiver herein.

*Justin S. Galland*, for the appellant.

*Max Monfried*, for the respondent.

JENKS, P. J.:

In this foreclosure suit the plaintiff obtained an order for a receiver *pendente lite*. The owner of the premises appeared specially to move to vacate the order.

The clause in the mortgage pertinent to a receiver did not dispense with notice of the application. The plaintiff neither had served his pleadings upon the owner of the premises, nor had he obtained an order for publication. The letter written by plaintiff's attorney to Mr. Leslie, an attorney, was not equivalent to notice of the application, because the

authority of Mr. Leslie to receive notice was not established, and in any event the letter lacked the precision requisite to notice.

We think that the order was void for lack of notice of the application. (*Jarmulowsky v. Rosenbloom*, 125 App. Div. 542; *Dazian v. Meyer*, 66 id. 575; *Elias v. Band*, 167 id. 940.)

The clause in the mortgage that upon default the mortgagee could enter the premises, take possession thereof and receive the rents and profits for application upon account, does not help the plaintiff, inasmuch as that is a separate and an independent provision intended to confer a different right. (*Sullivan v. Rosson*, 166 App. Div. 73.)

If it be said that notice was difficult or even impossible on account of the evasion or the absence of the defendant, the answer is that if an order for publication had been made, the appointment of the receiver could have been made without notice. (*Jarmulowsky v. Rosenbloom*, *supra*, 544, citing *Fletcher v. Krupp*, 35 App. Div. 586.) Notwithstanding the forceful plea of the appellant, the discretion of the court should not be disturbed upon the facts. (*Fletcher v. Krupp*, *supra*, 588.)

The order of the County Court of Kings county must be reversed, with ten dollars costs and disbursements, and the motion to vacate the order appointing the receiver granted, without costs. But any rents collected by the receiver, less his legal charges thereon, must be paid into court to the credit of the action.

THOMAS, MILLS, RICH and PUTNAM, JJ., concurred.

Order of the County Court of Kings county reversed, with ten dollars costs and disbursements, and motion to vacate the order appointing receiver, granted, without costs. But any rents collected by the receiver, less his legal charges thereon, must be paid into court to the credit of the action.

In the Matter of the Judicial Settlement of the Account of Proceedings of JEPHTHA VAN VLIET and JOHN J. SMITH, as Executors, etc., of ANNA VAN VLIET, Deceased.

JANE IDA ELIZABETH VICTORIA SPENCLEY LLOYD, Appellant;  
JEPHTHA VAN VLIET and Another, as Executors, and Another, Respondents.

Second Department, February 21, 1918.

**Will — latent ambiguity in describing beneficiary — parol evidence to identify intended legatee — costs — discretion of Surrogate's Court.**

Where a testator in a will hastily prepared bequeathed a certain sum to "Jennie Spencley and \$5,000 to Albert Spencley, the children of my brother Martin Spencley," and it appears that Jennie Spencley is the daughter of another brother, William Spencley, and had lived with deceased many years, and that the name of the daughter of Martin Spencley is Jane Ida Elizabeth Victoria Lloyd, and that she resides in Canada, said facts show a latent ambiguity, permitting the admission of parol evidence to identify the intended legatee.

Although costs are ordinarily in the discretion of the Surrogate's Court, an order, imposing full trial costs on a niece who was brought in by citation and appeared and contested an issue which had arisen through haste in making and executing the will, will be modified by striking out said costs.

APPEAL by Jane Ida Elizabeth Victoria Spencley Lloyd from a decree of the Surrogate's Court of the county of Queens, entered in the office of said Surrogate's Court on the 31st day of July, 1917, overruling objections to the accounts herein.

*Selden Bacon*, for the appellant.

*Rawdon W. Kellogg*, for the respondent Jennie Spencley.

*John Ewen*, for the respondents executors of the will of Anna Van Vliet, deceased.

PER CURIAM:

This will, made in haste, May 22, 1914, in its 10th clause bequeathed \$10,000 to "Jennie Spencley and \$5,000.00 to

Albert Spencley, the children of my brother, Martin Spencley." Respondent Jennie Spencley is the daughter of another brother, William Spencley. She had lived with deceased many years. Appellant is the daughter of Martin Spencley, but her name is Jane Ida Elizabeth Victoria Lloyd. She resides at Peterborough, Canada, and had married William John Lloyd on October 31, 1888. Notwithstanding the learned argument for the appellant, we think the surrogate rightly held that these facts showed a latent ambiguity which let in parol evidence. (*Matter of Coughlin*, 171 App. Div. 662; *affd.*, 220 N. Y. 681; *Baumann v. Steingester*, 213 id. 328.) This parol evidence, left with little contradiction, amply identified the respondent as the intended legatee.

While costs are ordinarily in the discretion of the Surrogate's Court, it would seem a hardship for the full trial costs to be imposed on this niece, who was brought in by citation naming her as Jane I. E. V. Lloyd. She appeared and contested an issue which had arisen through the haste in making and executing the will. Hence the decree of the surrogate is varied by striking out these costs as against appellant, and, as thus modified, the decree of the Surrogate's Court of Queens county is affirmed, without costs of appeal to either party.

JENKS, P. J., THOMAS, PUTNAM, BLACKMAR and KELLY, JJ., concurred.

Decree of the Surrogate's Court of Queens county modified by striking out the costs as against the appellant, and as thus modified affirmed, without costs of appeal to either party.

# CASES REPORTED WITH BRIEF SYLLABI

AND

## DECISIONS HANDED DOWN WITHOUT OPINION.

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### SECOND DEPARTMENT, NOVEMBER, 1917.

In the Matter of the Petition of ROBERT L. CHAPMAN, Appellant, to Prove the Last Will and Testament of MARTHA E. CHAPMAN, Deceased.

HENRY E. CHAPMAN, Respondent.

*Wills — fraud and undue influence — sufficiency of evidence.*

Appeal from a decree of the Surrogate's Court of Kings county, entered February 28, 1917, denying probate, and also from an order entered on the same day, denying the petitioner's motion for a new trial.

PUTNAM, J.: The paper propounded as the will of Mrs. Chapman was executed only about a week after an exciting family controversy touching the disposition of the Stock Exchange seat of the late Henry T. Chapman, deceased's husband. Filial and parental relations had been abruptly broken off, so that the elder son had not been thereafter admitted to his mother's home. Deceased had been in a highly wrought nervous state, especially when fearful of loss of her property. The testimony showed an influence that made her fear to oppose her younger sons. Deceased had expressed regrets at her alleged will, saying, however, it was all over now, as she would soon die, and let the brothers "fight it out." No objection was made to the form of the controverted questions of fact to be tried. There was a fair conflict of evidence, which was submitted to the jury in a charge free from error. The jury found for the contestant on the issue of fraud and undue influence. In view of all the testimony, we think the learned surrogate rightly denied proponent's motion for a new trial. The decree and order of the Surrogate's Court of Kings county are, therefore, affirmed, with costs payable out of the estate. Stapleton, Rich and Blackmar, JJ., concurred; Jenks, P. J., not voting. Decree and order of the Surrogate's Court of Kings county affirmed, with costs payable out of the estate.

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GERTRUDE M. BARNHART, as Administratrix, etc., of JOHN A. BARNHART, Deceased, Respondent, v. THE AMERICAN CONCRETE STEEL COMPANY, Appellant.

*Master and servant — negligence — death — constitutional law — New Jersey statute.*

Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of the county of Nassau on the 1st day of May,

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1916, in favor of the plaintiff, and also from an order entered in said clerk's office on the 13th day of April, 1917, denying a motion for a new trial.

Judgment and order reversed, with costs, and complaint dismissed, with costs, on the ground that the New Jersey Compensation Law\* was applicable to the case as the decedent was a resident of New Jersey, the defendant, a New Jersey corporation, and the contract of hiring was made there, and we conclude that the New Jersey statute governed, although the accident happened while the decedent was, under such employment, at work within this State. Jenks, P. J., Stapleton, Mills and Putnam, JJ., concurred; Blackmar, J., read for affirmance.

BLACKMAR, J. (dissenting): The Constitution of the State of New York (Art. 1, § 18) provides that "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated." The right of action sounds in tort, and is governed by the laws of the State where the injuries are inflicted. By this provision it became a cause of action vested in the personal representative of the deceased, and cannot be waived by the employee, for it is not his nor derived from him, but granted by the Legislature and confirmed by the Constitution directly to his personal representatives representing his next of kin.† Passing for the moment the constitutional and legislative enactment regarding workmen's compensation in the State, I think it must be admitted that in case of a cause of action arising in this State, the Legislature of the State of New Jersey has no power to abrogate it, nor to authorize an employee to bargain away that right, given by our statute to his next of kin. Article 1, section 19, of our Constitution, adopted as an amendment in 1913, provides that "Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment \* \* \* of compensation for injuries to employees or for death of employees resulting from such injuries \* \* \* or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries," etc. This amendment to the Constitution restored the legislative competency over this class of actions in so far as they grew out of the relations of master and servant; and the Workmen's Compensation Law ‡ has, *pro tanto*, abrogated it. But the amendment did not confer on the Legislature of New Jersey the power to abrogate this cause of action in the State of New York. How, then, can a legislative act in New Jersey, and a contract made thereunder, abrogate a cause of action for damages in tort, created by a New York statute, and protected by a New York Constitution?

\* N. J. Laws of 1911, chap. 95, as amd.—[RFP.]

† See Code Civ. Proc. § 1902 *et seq.*—[RFP.]

‡ Consol. Laws, chap. 67 (Laws of 1914, chap. 41), as amd.—[RFP.]

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Second Department, November, 1917.

HENRY BLOHM, Respondent, v. ERIC J. EVERETT, Appellant.—Plaintiff has a right to have the answer state new matter as a counterclaim separate and distinct from the same plea as a defense. The denials sought to be imported by reference to the former part of the answer were unavailing, because in confused form. If essential to complete the separate plea, and to save application of the rule *in pari delicto*, such denials can be directly made in the answer as amended. Order affirmed, with ten dollars costs and disbursements. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

VINCENT DE LUCA, Appellant, v. DOMENICO CALANDRA and Others, Respondents.—Judgment affirmed, with costs. No opinion. Thomas, Stapleton, Mills and Rich, JJ., concurred; Jenks, P. J., not voting.

ABRAHAM DEMBAR, Respondent, v. CHARLES L. BORCK, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

GEORGE C. DOBBS, Appellant, v. RAYMOND D. POWELL, Respondent, and Others, Defendants.—Order of the County Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

JOSEPH ELIAS, Appellant, v. PARAGON FILMS, INC., Respondent. (Appeal No. 2.)—Order affirmed, with ten dollars costs and disbursements. Without passing on the question whether an architect who is the agent of a corporation for the purposes of a building operation is a managing agent as the term is used in section 872 of the Code of Civil Procedure, it is enough that in this case the relations between the architect and the defendant were terminated before the action was brought. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

ROBERT J. FREEMAN, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, without prejudice to a motion to amend the complaint, should the costs of the prior action be paid. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

JOHN HINCHIE, Respondent, v. ALONZO C. KASSENBRICK and ANNIE KASSENBRICK, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

IDA MAY HOFF, Respondent, v. NASSAU ELECTRIC RAILROAD COMPANY, Appellant.—Judgment and order of the County Court of Kings county reversed and new trial ordered, costs to abide the event, upon the ground that the verdict is against the weight of the evidence. The fact that one of the jurors, during recess, went to drive with one of plaintiff's physicians may have influenced the verdict. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

WILLIAM T. HUTCHESON, Appellant, v. WILSON & Co., Respondent.—Order of the County Court of Nassau county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

In the Matter of the Application of JAMES CONWAY, Appellant, for a Writ of Mandamus to JOHN T. FETHERSTON, as Commissioner of Street Cleaning of the City of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

ELI KAMENER and JACOB WACHSMAN, Respondents, v. WALTER H. ROZELL, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

BECKIE LACOV, Respondent, v. BIG "T" FILM CORPORATION and Another, Defendants, Impleaded with JAMES O. MILLER, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

SAMUEL H. LUMMIS, as Trustee in Bankruptcy, etc., Appellant, v. J. SPENCER CROSBY and Others, Defendants, Impleaded with ANNA H. STIER, Respondent.— Judgment on the pleadings dismissing the complaint affirmed, with costs, on the authority of *Lummis v. Crosby* (176 App. Div. 315). Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

THE MANUFACTURERS' NATIONAL BANK OF BROOKLYN, Plaintiff v. CLARA B. MORLEY, Defendant, and ALFRED E. OWERS, Respondent. MANUFACTURERS' TRUST COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

CHARLES H. MAURO, Appellant, v. HOWARD COOPER, Respondent.— Judgment of the Appellate Term unanimously affirmed, with costs. We think there is compliance with the requirements of section 125 of the Municipal Court Code of the city of New York\* when the court renders judgment on the merits and it makes a note of that fact. When a note is not made, the judgment is to be deemed one of nonsuit, and we hold that it is a judgment of nonsuit we are affirming. Present — Jenks, P. J., Thomas, Stapleton, Putnam and Blackmar, JJ.

GROVER C. MORCH, Respondent, v. THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

JOHN F. MORONEY, Appellant, v. LAWRENCE C. MANUEL, Respondent.— Judgment of dismissal modified by striking out the words "on the merits," and as so modified unanimously affirmed, without costs. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

MARY NICHOLSON, as Administratrix, etc., of JOHN NICHOLSON, Deceased, Respondent, v. GREELEY SQUARE HOTEL COMPANY, Appellant.— Judgment and order reversed and complaint unanimously dismissed, with costs, on the ground that decedent was guilty of contributory negligence as matter of law. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

JOHN NOSNER, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COM-

\* Laws of 1915, chap. 279, § 125.— [REp.]

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PANT, Appellant. (Appeal No. 1.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

JOHN NOSNER, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant. (Appeal No. 2.) — Order reversed, with ten dollars costs and disbursements, and matter remitted to the Special Term for a consideration of the application upon the merits, on the ground that the court at Special Term had the power to open the default. (See *Mott v. Mott*, 134 App. Div. 569.) Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

ELISE PEDERSEN, Respondent, v. UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.— The methods of cross-examination of defendant's witnesses were highly objectionable. Improper questions to plaintiff's witnesses were also erroneously permitted. Adverse witnesses cannot be required to characterize opposing testimony. Yet here this was done, even to the extent of distorting such prior testimony. Neither does the heat of a trial and ardor of cross-examination excuse misrepresentation of what a witness had himself previously said. Persistent repetition of improper questions tending to cast prejudice on a party defendant are disrespectful to the court, and discredit any verdict. The cumulative effect of all these acts deprived defendant of a fair trial. The judgment and order are, therefore, reversed, with costs to the defendant, and a new trial granted. Mills, Rich, Putnam and Blackmar, JJ., concurred; Jenks, P. J., concurred in the result.

OLE PEDERSEN, Respondent, v. UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.— As this cause was tried with the action of *Pedersen v. Union Railway Co.* (ante, p. 885), the recovery falls with that reversal, decided herewith. This judgment and order are, therefore, reversed and a new trial granted, with costs to the defendant. Only one bill of costs for the two appeals. (*Woodworth v. Brooklyn Elevated R. R. Co.*, 29 App. Div. 1, 3.) Mills, Rich, Putnam and Blackmar, JJ., concurred; Jenks, P. J., concurred in the result.

MARY PIERCE, Respondent, v. CHARLES MOORE, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. The cause of action arose in New York county. The witnesses, all except the son of the defendant, live in New York. Two of the witnesses are members of the police force in New York, who should not unnecessarily be called away from the city. Justice is as apt to be obtained in New York county as in Westchester; and, therefore, we think that the convenience of witnesses and the ends of justice will be promoted by changing the place of trial to New York county. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JACOB WIDDER, Appellant.— Judgment of conviction of the Court of Special Sessions reversed and new trial ordered. We cannot affirm the conviction because the Sanitary Code, of the provisions of which the court cannot take judicial notice, was not in evidence before the magistrate, and con-

sequently is not before us. The record for that reason does not show that the defendant was guilty. Jenks, P. J., Stapleton, Mills, Rich and Blackmar, JJ., concurred.

**LENA B. ROBERTS, Respondent, v. WILLISON A. ROBERTS, Appellant.**—The order of July 28, 1917, denying defendant's motion to resettle the order of July 3, 1917, denying his motion for a change of the place of trial of the action from Orange to Broome county, is reversed; the defendant's motion to resettle such order by omitting therefrom the following recital, "and the affidavits of Willison A. Roberts, verified June 15, 1917, of Lizzie Roberts and Wesley Roberts, each verified June 15, 1917, of Raphael T. Medrick, Frank H. Northrup, M. H. Mason and George E. Rosencranse, each verified June 14, 1917, and of Lloyd Stevens, S. A. Cisco, Ella M. Padien, William Lain, Jennie Higby, Gertrude Higby and F. K. Lamereaux, each verified June 15, 1917, and of Fred J. Huegle, verified June 16, 1917," is granted, and said order, as so resettled, is reversed and the defendant's motion to change the place of trial to Broome county is granted, upon the ground that plaintiff being a non-resident of the State, and defendant a resident of Broome county, he had the right to have the action tried in the county of his residence, and this right could not be defeated by proof that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial in Orange county, in which county neither party resided. (*Veeder v. Baker*, 83 N. Y. 156; *Lageza v. Chelsea Fibre Mills*, 135 App. Div. 731.) Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

**LOUIS ROBISON, Appellant, v. GEORGE WALTER, Respondent.**—The finding that on the "law day" the vendor's title was incumbered of record by two tax sales is not disputed. But appellant urges that having ten months later obtained the cancellation of such liens, he could then sue the vendee for specific performance. In asking for such relief, based on a title cured so long after the date of closing, evidence was received that appellant had left the house without any caretaker, so that the plumbing, with many doors and all the windows, had been taken out, the ceilings had fallen, and the roof had been demolished. This made it inequitable to compel defendant to take it in its damaged condition. As plaintiff sought specific performance based on his later removal of liens, the changed state of the property in this interval became material. It could not be fairly disregarded by the court, even without being set up by a supplemental answer. The judgment for defendant is, therefore, unanimously affirmed, with costs. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

**REBECCA ROSENKRANTZ, Respondent, v. STANDARD MOTOR SERVICE COMPANY, INC., Appellant, and CARL LARSEN and EDWARD PERKINS, Defendants.**—Judgment and order reversed and new trial granted, costs to abide the event, because of the inconsistency of the verdict against the alleged principal (liable only under the rule of *respondet superior*), with no finding against the driver of the automobile. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

**VITO RUSSILLO and DONATA MARIA RUSSILLO, Respondents, v. THE**

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VILLAGE OF PORT CHESTER and Others, Appellants.— Order affirmed, without costs. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

CHARLES SCHUSTER, Respondent, v. THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

PHILIP SIEGEL, Appellant, v. THE NASSAU ELECTRIC RAILROAD COMPANY, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ABRAHAM I. SILVERMAN, Respondent, v. BERTHA SILVERMAN, Appellant, Impleaded with ALBERT MARIASH, Defendant.— Order affirmed, without costs. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

UNITED STATES DRAINAGE AND IRRIGATION COMPANY, INC., Appellant, v. DEGNON REALTY AND TERMINAL IMPROVEMENT COMPANY and DEGNON CONTRACTING COMPANY, Respondents, and Another, Defendant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to the defendants to withdraw the demurrer and answer within twenty days on payment of the costs. The character of the work to be done as stated in the notice of lien, and of the land described, plainly shows an intention to claim a lien on the land described in the seventh subdivision of the notice of lien. We do not think that it can be held as matter of law that the description in the notice of lien is not sufficient for identification, and that is all the statute\* requires. Although there is no town of Corona, yet there is a locality known by that name, and the situation is such that the sufficiency of the description contained in the notice of lien should not be decided on demurrer. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

DAVID S. VAN WICKLEN, Respondent, v. SPRINGDALE REALTY COMPANY, Appellant.— Order setting aside verdict affirmed, with costs. The land claimed by defendant differed in area and description from the conveyance by which its title was derived. The verdict in defendant's favor, therefore, was properly set aside. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

MICHAEL VISCONTI, by PIETRO VISCONTI, His Guardian ad Litem, Respondent, v. HENRY BECKER, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Mills, Rich and Blackmar, JJ.

SAMUEL J. BELFER, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

HANNAH A. BRENNEN, Respondent, v. JOHN T. BLADEN, as Successor Trustee, under the Last Will and Testament of JAMES RODWELL, Deceased, etc., and Others, Appellants.— Interlocutory judgment affirmed, with costs.

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\*See Lien Law (Consol. Laws, chap. 33; Laws of 1909, chap. 38), § 9. Amd. by Laws of 1916, chap. 507.— [REF.]

No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

JOHN J. DE BOVES, Respondent, v. CENTURY STEEL COMPANY OF AMERICA, Inc., Appellant.— Interlocutory judgment affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

SAMUEL E. GREENBERG, Respondent, v. SAUL BELLIN and ABRAHAM H. BELLIN, Appellants.— Judgment as amended unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

GABRIEL HEATTER, Respondent, v. DAY PUBLISHING COMPANY, Appellant.— Although by the contract sued upon the defendant engaged both Heatter, the plaintiff, and one Seidman, who is not here joined, the compensations were to be payable separately. Though the contract repeatedly recited the parties engaged as "said copartners," the fact of such copartnership did not appear in the terms of the contract of employment. Plaintiff, therefore, could sue for his separate damage by his dismissal. The contract, while joint in form, was several in interest. (*Villard v. Moyer*, 123 App. Div. 629; 9 Cyc. 704, 705.) Even if they were partners, defendant had agreed to pay each for his separate earnings or commission, which severed the rights to sue. (*Austin v. Walsh*, 2 Mass. 401, 405.) The order granting plaintiff's motion for judgment is, therefore, unanimously affirmed, with ten dollars costs and disbursements. Within ten days, however, defendant may withdraw its demurrer, and answer, on payment of costs, including the costs of this appeal. Present — Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ.

MAX HEISCHUBER, Appellant, v. MINSKER REALTY COMPANY, Respondent.— Order affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

IMPERATOR REALTY COMPANY, Inc., Appellant, v. TESEREMOS REALTY CORPORATION and Others, Defendants. EDMOND F. MCCARTHY, Receiver, Respondent.— Appeal dismissed by default, with ten dollars costs and disbursements. Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of HENRY R. HOWELL, Deceased.— Decree of the Surrogate's Court of Kings county affirmed by default, with costs. Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ., concurred.

CATHARINE LEININGER, Respondent, v. THE CITY OF NEW YORK, Appellant.— Although the mere difference in height of these flagstones on the sidewalk may not have established negligence of the city where an edge of one flagstone measured three and one-half inches above the edge of the next one, yet the jury could have found from the testimony of plaintiff that she had caught her foot under the edge of this raised flagstone. The evidence of the patrolman, Mahoney, showed that at this joint the water had washed out the dirt, leaving an opening in which the foot might be caught. This was confirmed from the evidence of a prior accident to the witness Braun at this place, by which her foot was caught, causing a fall and a knee dislocation. The facts raised an issue for the jury, with whose verdict we see

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no occasion to interfere. The judgment and order are accordingly unanimously affirmed, with costs. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK**, Respondent, v. **CONRAD GIFFONE**, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed by default. Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ., concurred.

**THE PEOPLE OF THE STATE OF NEW YORK**, Respondent, v. **WILLIAM H. HALE**, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

**THE PEOPLE OF THE STATE OF NEW YORK**, Respondent, v. **HARRY SCHERZ**, Appellant.— By introducing evidence that the prosecutrix gave birth to a full term child on January 7, 1917, the People opened to the defendant the right to give any evidence that bore against such corroboration as this proof of birth tended to give to the alleged intercourse with appellant. (*People v. Flaherty*, 79 Hun, 48; 145 N. Y. 597.) In that view it was competent to show that the lewd verses which proclaimed the loose conduct and her resulting pregnancy were written by the prosecutrix and taken from her by her teacher at a much earlier date than that charged in the indictment. All the testimony brought the prosecuting witness within the long-settled rule: "If she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned." (4 Black Com. 213.) The judgment of conviction of the County Court of Kings county is reversed for errors both of law and fact, and a new trial ordered. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

**THE PEOPLE OF THE STATE OF NEW YORK**, Respondent, v. **CHARLES SIEKE**, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

**BRIDGED SALADINO**, Appellant, v. **JOSEPH G. GIAMBALVO**, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, on the ground that it does not appear from the complaint that an account to be examined is the immediate object of the action, and is directly involved. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

**LUCIETTA SCAGLIONE**, Respondent, v. **JOHN BEAVER**, as Receiver of the **SECOND AVENUE RAILROAD COMPANY**, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

**EVERETT H. TRAVIS**, as Administrator, etc., of **CHARLES L. BUECHLER**, Deceased, Appellant, v. **CHARLES S. MITCHELL** and **CARRIE HENDRICKS**, Respondents.— Judgment and order affirmed as to the defendant Hendricks,



without costs, upon the ground that no conversion by her was proven. As to the defendant Mitchell, judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the evidence does not clearly or convincingly establish that the alleged gift by the decedent to said defendant of the stock certificate, on July 9, 1913, was absolute and not merely to take effect at the death of the donor, and that the weight of the evidence indicates that it was of the latter character. Stapleton, Mills, Rich, Putnam and Blackmar, JJ., concurred.

MINNIE WALKER, as Administratrix, etc., of ROBERT G. WALKER, Deceased, Respondent, v. NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the verdict to \$15,000; in which event the judgment as so modified and the order are unanimously affirmed, without costs. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

HARVEY A. WILLIS, Appellant, v. ELSIE H. BIRD and ELIJAH W. HOLT, as Executors, etc., Respondents.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ.

MORRIS BERGER, Plaintiff, v. SARAH WEXLER, LENA BARNETT and Others, Defendants.— Motion denied, without costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

JOSEPHINE KNAPP LESTER, Appellant, v. GEORGE B. LESTER, Respondent.— Motion granted, and order signed. Present — Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ.

DAVID H. SMITH, Plaintiff, v. THE KRANTZ MANUFACTURING COMPANY, Defendant.— Application granted and order signed. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

JOSEPH P. CURRY and ROBERT M. CURRY, Copartners, etc., Respondents, v. JOHN ZITELLI and MARIA ZITELLI, Appellants.— Motion granted, without costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ. Order to be settled before Mr. Justice Blackmar.

LEWIS B. HAMILTON, as Executor, etc., Respondent, v. LIBBIE H. MUNCIE and Another, Appellants. LEWIS B. HAMILTON and Another, Respondents.— Motion denied, on condition that appellants perfect the appeal, place the case on the calendar for January, 1918, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

EUGENE HORTON, Respondent, v. THE HAYES COMPANY and Others, Appellants.— Motion denied, with ten dollars costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Application of JOHN H. ATKIN for Reinstatement as an Attorney and Counselor at Law.— Petition referred to Hon. Josiah T. Marean, as official referee, to take testimony and report the same to the court, with his opinion. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

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In the Matter of the Application of the BOARD OF SUPERVISORS OF ROCKLAND COUNTY, Relative to Acquiring Title, etc., for Highway Purposes, etc. State Highway No. 5389.—Motion denied, on condition that appellant perfect the appeal, place the case on the calendar for January, 1918, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Application of JOHN M. BROWN to Lay Out a Highway in the Town of Brookhaven, etc.—Motion granted, without costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Application of the CITY OF NEW YORK, Relative to Acquiring Title, etc., West Thirty-seventh Street, from Bulkhead Line of Gravesend Bay to Mean High Water Line, etc., Borough of Brooklyn.—Motion granted, without costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Settlement of the Account of CYRUS M. CRUM, as Sole Surviving Executor, etc., of JOHN W. SCHULER, Deceased, etc.—Motion denied, without costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Application of FREDERICK W. DE FOE for Admission to the Bar.—Application granted. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

IRENE KLEIN, an Infant, etc., Respondent, v. MANHATTAN STEAM BAKERY, INC., and Another, Appellants.—Motion for reargument granted, and case set down for Wednesday, December 5, 1917. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

ALEXANDER KLEIN, Respondent, v. MANHATTAN STEAM BAKERY, INC., and Another, Appellants.—Motion for reargument granted, and case set down for Wednesday, December 5, 1917. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

LILLIAN SMITH LEWIS and Others, Appellants, v. DAVID F. BUTCHER and Others, Respondents. (Action No. 1.) — Motion denied, without costs. Present — Thomas, Stapleton, Mills and Rich, JJ.

LILLIAN SMITH LEWIS and Others, Appellants, v. DAVID F. BUTCHER and Others, Respondents. (Action No. 2.) — Motion denied, without costs. Present — Thomas, Stapleton, Mills and Rich, JJ.

WILLIAM F. MARKS and Another, Appellants, v. JAMES BENNETT, Individually, etc., and Others, Respondents.—Motion granted, with ten dollars costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

ELIZABETH MARTIN, as Administratrix, etc., Respondent, v. SAMUEL A. HERZOG, Appellant, Impleaded with FRANCES HERZOG, Defendant.—Motion granted. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ. Order to be settled before Mr. Justice Thomas.

HENRY OLIGSCHLAGER, Appellant, v. WILLIAM F. CONNELL, Respondent.—Motion denied. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOHN CERULLI,

Appellant.— Motion denied. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH FAGGELLO, Appellant.— Motion granted. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. R. F. STEVENS COMPANY, INC., Appellant.— Motion denied. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ALFRED E. RICHARDSON, Appellant.— Order settled and signed. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. HENRY WETZEL, Respondent. THE PEOPLE OF THE STATE OF NEW YORK v. CHARLES A. GAAB, Respondent. THE PEOPLE OF THE STATE OF NEW YORK v. DAVID WALLACE, Respondent.— Motions denied. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

EUGENE LAMB RICHARDS, as Superintendent of Banks of the State of New York, Plaintiff, v. LILLIE SCHARMANN and Others, as Executors, etc., Defendants.— Motion granted, without costs, upon condition that the appeal be heard at the January term, 1918. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

NATHAN A. SEAGLE, as Executor, etc., Plaintiff, v. JOHN D. BARRETO, Defendant.— The order of the learned court at Special Term seems to be fair, and a proper exercise of discretion. The motion for a stay is, therefore, denied, without costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

SPRINGFIELD NATIONAL BANK, Respondent, v. EDWARD N. BREITUNG and Others, Appellants, and Others, Defendants.— Motion for stay granted. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

FRANK TRANI, Respondent, v. SUMNER GERARD, Appellant.— Motion denied, on condition that the appellant perfect the appeal, place the case on the December calendar and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

FRANK X. BARRETT, Respondent, v. THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY OF HARTFORD, CONN., Appellant.— Appeal transferred to the First Department for hearing and determination. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

JOHN H. BRYERS, Respondent, v. HARRY J. SOKOLOW, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that reversible error is presented by the appellant's exceptions to the refusal of the trial court to instruct the jury, as requested, that "the circumstances that the Magistrate held the plaintiff after an examination, after the hearing of all the witnesses, may be considered by them on the question of whether there was malice, or malice inferable from the absence or presence of probable cause." Jenks, P. J., Stapleton, Mills, Rich and Blackmar, JJ., concurred.

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**WILLIAM M. COLLARD and CHARLES COLLARD, Respondents, v. MARY C. RELYEA, as Executrix, etc., of GEORGE RELYEA, Deceased, Appellant.**—Judgment of the County Court of Orange county unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

**BERTHA ELIZABETH CROMWELL, Appellant, v. GEORGE C. BYNNER and Others, Defendants. RALPH K. JACOBS, Referee, Appellant; ARCHIBALD W. J. POHL and JAMES CARRANO, Purchasers, Respondents.**—Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. We find no concession that at the date to which the closing of title was adjourned there were defects in the title, and there is no competent proof of the existence of defects. Should we assume the existence of defects asserted but not proved, they were of a nature that could be seasonably cured. The assignee submitted himself to the jurisdiction of the court by reason of his taking the assignment and his subsequent interference with the proceeding. Thomas, Stapleton, Mills, Putnam and Blackmar, JJ., concurred.

In the Matter of the Application of **MICHAEL MONTARIO, Respondent, for a Writ of Mandamus against NEW YORK TELEPHONE COMPANY, Appellant.**—Order reversed, with ten dollars costs and disbursements, and motion for peremptory writ of mandamus denied, with fifty dollars costs, upon the ground that we think that the opposing affidavits of the police officers showed that the betting over the telephone in the petitioner's premises was carried on by his employee in his very presence, and with his tacit permission, and, further, that he practically admitted as much in his statement to the police officer that, if the police did not take any action against him, he "would not permit his telephone to be used again for gambling purposes." Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

**EDWARD LANGRIDGE, Respondent, v. WILLIAM THURSTON, Appellant.**—Judgment and order unanimously affirmed by default, with costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

**MILTON EDWARD LANGRIDGE, an Infant, etc., Respondent, v. WILLIAM THURSTON, Appellant.**—Judgment and order unanimously affirmed by default, with costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. MICHAEL DI MEO, Also Known as MICHELE DIMEO, Respondent.**—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Although section 597 of the Code of Criminal Procedure conferred the discretionary power upon the court to remit the forfeiture of bail, or any part thereof, yet this is a judicial discretion and may be reviewed. (*Matter of Sayles*, 84 App. Div. 210.) An undertaking of bail is a serious contract, and imposes upon the surety the absolute obligation to produce his principal when called for trial. This application should not be granted save under exceptional circumstances. In the present case the surety failed in the discharge of his duty, which is shown by the very fact which

he offered as an excuse, namely, that the accused left this country and sailed for Liverpool. It is not shown that the enforcement of the undertaking will impose undue hardship upon the surety or his family, and indeed this is a reason which should be very rarely received. The suggestion that the accused would have been acquitted cannot be considered. That question can only be tried in the criminal courts, and not collaterally on an application to discharge a bail bond. (*People v. Schwarze*, 168 App. Div. 124; *People v. Spear*, 1 N. Y. Cr. Rep. 538; *People v. Nooney*, 73 Hun, 566; *People v. Levy*, 169 App. Div. 571.) Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

GEORGE RALSTON, Respondent, v. CARMAN R. LUSH, Appellant, and Others, Defendants.— Judgment reversed and new trial granted, costs to abide the final award of costs. The situation between the brothers made admissible declarations of Morris Jackson to the witness Lawrence. While incompetent to prove a grant, such declarations of a prior owner are received to explain seizin, or to qualify possession, especially as between persons in joint or contiguous occupancy. (*Van Dyck v. Van Beuren*, 1 Johns. 345; *Jackson v. Bard*, 4 id. 230; *Pitts v. Wilder*, 1 N. Y. 525, 527; *Chadwick v. Fonner*, 69 id. 404.) Therefore the exception to the court's ruling at folio 88 of the record was well taken. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

MARGARET E. SHEA, as Administratrix, etc., of WILLIAM J. SHEA, Deceased, Appellant, v. THE CITY OF NEW YORK, Respondent, and Another, Defendant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ.

THOMAS F. SMITH, Respondent, v. SARAH A. SMITH and EDWARD J. SMITH, Appellants.— Judgment affirmed, with costs, as against appellant Sarah A. Smith. No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

SPRINGFIELD NATIONAL BANK, Respondent, v. EDWARD N. BREITUNG and Others, Appellants, and Others, Defendants. (Appeal No. 1.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

SPRINGFIELD NATIONAL BANK, Respondent, v. EDWARD N. BREITUNG and Others, Appellants, and Others, Defendants. (Appeal No. 2.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

LOUIS M. TAYLOR, Appellant, v. EMILIE A. WEEKS, Respondent.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

GEORGIANNA THOMPSON, an Infant, by GEORGE J. THOMPSON, Her Guardian ad Litem, Respondent, v. ANDERSON ELECTRIC CAR COMPANY, Appellant.— Although defendant stood in the position of owner of this motor car, which was run by one who had been in defendant's employ during working hours, such inference of responsible control has been met and overcome by proof that on this evening trip the car had been lent to Mr. Kretchmer for his private purpose to bring his mother home from a hospital. The

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driver was, therefore, in Mr. Kretchmer's personal service, and was not engaged in defendant's business. This evidence was uncontradicted and disproved any presumption that defendant had custody, control or authority over the driver, at the time of the injury. Hence the judgment must fall. (*Potts v. Pardee*, 220 N. Y. 431; *Farthing v. Strouse*, 172 App. Div. 523.) The judgment and order are, therefore, reversed, and the complaint is unanimously dismissed, with costs. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ISIDORE TEITELBAUM, Respondent, v. HERMAN WALTUCH, Sued Herein as HARRY WALTUCH, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Upon a motion to change the place of trial in a transitory action, where the number of witnesses is about equal in each county, we think as a general rule it would be in furtherance of justice to try the case in the county where the cause of action arose, and we apply that rule in reversing this order. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

MARY T. WORTHINGTON, Plaintiff, v. PAUL B. WORTHINGTON, Defendant.— The decision of this motion will be withheld until Wednesday, November 21, 1917, and the moving party is directed, on or before that day, to furnish this court with certified copies of the order punishing the defendant for contempt, and the order of Tompkins, J., which it is claimed modified said order; and a statement of the amount that the moving party concedes to be due. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

GEORGE BAGDON, Respondent, v. PHILADELPHIA AND READING COAL AND IRON COMPANY, Appellant.— Motion granted, and order signed. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

JOSEPH ELIAS, Respondent, v. PARAGON FILMS, INC., Appellant.— Motion for reargument denied, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

In the Matter of the Application of the CITY OF NEW YORK, Relative to Acquiring Title, etc. Opening and Extending of West Twenty-fourth Street, etc.— Motion denied. (See *Matter of Brooklyn Children's Aid Society*, 166 App. Div. 852; 215 N. Y. 705.) Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

LILLIAN SMITH LEWIS, and Others, Appellants, v. DAVID F. BUTCHER and Others, Respondents. (Actions 1 and 2.) — Motions denied. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

ELISE PEDERSEN, Respondent, v. UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.— Motion to resettle order granted so as to direct that the costs when taxed shall be chargeable only upon any recovery that the plaintiff may hereafter obtain. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JACOB WIDDER, Appellant.— Motion for reargument granted and case set down for Wednesday, December 5, 1917. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

F. W. WOOLWORTH COMPANY, Respondent, v. MAYER S. GINSBURG,

Appellant.—Motion for reargument denied, without costs. Present — Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ.

MAYER S. GINSBURG, Appellant, v. F. W. WOOLWORTH COMPANY, Respondent.—Order signed. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

EDWARD T. GORMAN, by JAMES P. GORMAN, His Guardian ad Litem, Respondent, v. WILSON & ENGLISH CONSTRUCTION COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ANDREW J. HAGEN, Respondent, v. JOHN F. FLYNN, Appellant.—Judgment and order of the County Court of Richmond county reversed, and new trial ordered, costs to abide the event, upon the ground that plaintiff did not make out a case by a fair preponderance of the evidence that justified a finding of negligence or absence of contributory negligence. The court should have granted the motion made to strike out the testimony as to the injury of the shoulder, as proof thereof was not permissible under the bill of particulars upon the question of damages. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

FREDERICK H. HURDMAN, Appellant, v. GEDNEY FARM COMPANY, INC., Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

In the Matter of the Estate of CATHERINE McMAHON, Deceased. MATTHEW BROM, Individually and as Executor, etc., Appellant; CATHERINE M. McMAHON, Respondent.—Decree of the Surrogate's Court of Rockland county affirmed, without costs. No opinion. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

In the Matter of the Petition of NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Appellants, Relative to Acquiring Title, etc., on Fulton Street, etc., against WELLS & ZERWECK, a Corporation, and Others, Respondents.—Order of the Special Term modified by eliminating therefrom the provisions for payment to the property owners of interest on the awards from September 26, 1914, and as so modified affirmed, without costs of this appeal. It has not been pointed out by the appellants that the award of the commissioners is irregular, or that there was any error of law in the proceedings, or that the award is excessive within the rules laid down governing the review of awards made by commissioners of condemnation, proceeding under chapter 23 of the Code of Civil Procedure. The rule that the finding of commissioners upon the value of property will not be interfered with unless it appears that they have proceeded upon some erroneous theory of law, or have erred in the admission or exclusion of evidence to the obvious prejudice of the parties, is still the law as to proceedings under this chapter of the Code of Civil Procedure. The court, however, had no power, in confirming the award, to add interest thereto. The powers of the court and of the commissioners under the Condemnation Law are prescribed by statute, and the court has no power to increase or diminish the amount of the award, as its powers are confined to confirmation of the report or setting it aside. We cannot assume,

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either for the purpose of vacating the award or sending it back to the commissioners for further findings, that they have not followed the rule laid down in *Matter of Manhattan Railway Co. v. Wingert* (217 N. Y. 682). Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

ANNA KEARNEY, an Infant, etc., by JAMES T. CRANE, Her Guardian ad Litem, Respondent, v. VITAGRAPH COMPANY OF AMERICA, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the verdict to the sum of \$4,000; in which event the judgment as so modified and the order are unanimously affirmed, without costs. Stapleton, Mills, Rich, Putnam and Blackmar, JJ., concurred.

KATHRYN F. KRONENWETT, Respondent, v. WILLIAM KRONENWETT, Appellant.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

GILBERT E. LOPEZ, Respondent, v. LEWIS NIXON, Appellant.— Judgment affirmed on reargument, with costs. On re-examination of the record, we find no evidence that the note was negotiated in violation of instructions or in breach of faith, or under such circumstances as amounted to a fraud. It is not shown when the conversation between defendant and Schroeder took place, whether before or after the note was negotiated, which was evidenced by plaintiff's possession of the note duly indorsed. The statement of Schroeder that he then had the note in his possession is not competent to impeach plaintiff's title. The production by plaintiff of the note duly indorsed raises the presumption that he was a holder in due course. The presumption was not overthrown by defendant's evidence, and the direction of the verdict was right. Jenks, P. J., Thomas, Stapleton, Mills and Blackmar, JJ., concurred.

FRANK NORDONE, Respondent, v. ALPHA PORTLAND CEMENT COMPANY, Appellant.— Order modified so as to extend the examination to the question whether the plaintiff, at the time of the alleged representations, had the contract for the construction of the sewer; and as so modified affirmed, without costs. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH BRENNAN, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RICHARD HARDING, as Sealer of Weights and Measures of the City of White Plains, Appellant, v. MORTIMER C. O'BRIEN, City Judge of the City of White Plains, and CLINTON C. SWACKHAMER, Respondents.— Order affirmed, without costs, upon the grounds, *first*, that the writ herein was not made returnable forthwith, nor was the same made returnable before the term which granted it, nor upon the first day of a future term, as provided by section 2095 of the Code of Civil Procedure; *second*, that the petition upon which the alternative writ is issued fails to set forth facts sufficient to give the court jurisdiction to issue the same. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

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GILBERT B. SAYRES, as Trustee in Bankruptcy of EDWARD S. SMITH, a Bankrupt, Appellant, v. WILLIAM D. CAMPBELL and Others, Copartners, etc., Respondents.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

HERMAN SCHELHORN, Appellant, v. WESTCOTT EXPRESS COMPANY, Respondent.— Judgment reversed and new trial granted, costs to abide the event, on the ground that the question whether the emergency employment had not terminated, so that the plaintiff and the chauffeur were no longer fellow-servants, was a question of fact for the jury. Jenks, P. J., Mills and Putnam, JJ., concurred; Thomas, J., concurred, and is also of opinion that the question of emergency servant is not present in the case.

THOMAS TULLY, Respondent, v. CRANFORD COMPANY, Appellant.— Reargument ordered, and case set down for Wednesday, December 5, 1917. Jenks, P. J., Thomas, Mills and Blackmar, JJ., concurred; Putnam, J., not voting.

GEORGE WEYANT, Appellant, v. HARRY C. ROSENBERG, Respondent.— Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the verdict is against the weight of evidence. We also think that it was error to admit in evidence defendant's Exhibit A, inasmuch as it was a self-serving declaration. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

WRIGHT FLYING FIELD, INC., Appellant, v. EMPIRE STATE AIRCRAFT CORPORATION, Respondent.— Order of the County Court of Nassau county affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Stapleton, Mills and Rich, JJ., concurred; Jenks, P. J., not voting.

LESLIE BELDEN, Respondent, v. NORTHERN HOTEL COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ESTHER BLOOM, Respondent, v. AARON BENNETT, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

JAMES W. CROOKS and Others, Respondents, v. THE AEOLIAN COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. We think there is evidence which authorized the referee to decide that on the 9th day of April, 1913, no competing manufacturer was then manufacturing an organ having the same musical effect as that produced by the invention covered by patents Nos. 671, 691. There is no evidence of either waiver or estoppel; and for that reason, while affirming the judgment, we reverse findings 27, 28, 29, 30, 33, 34 and 35. Present — Jenks, P. J., Stapleton, Mills, Putnam and Blackmar, JJ.

CHARLES L. McGRATTY and EDWARD J. McGRATTY, Copartners, etc., Appellants, v. KRANTZ MANUFACTURING COMPANY, INC., Respondent.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ.

JACOB MYERS, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs, on authority of *Myers v. Brooklyn Heights Railroad Co.* (180 App.

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Div. 217), decided herewith. Present — Jenks, P. J., Thomas, Stapleton Rich and Putnam, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOHN A. SPITZNAGEL, Respondent, *v.* HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, and Another, Appellants.— Order of the judge of the County Court of Kings county, directing the issue of a tax certificate for the excise year beginning October 1, 1917, reversed, with fifty dollars costs and disbursements of this appeal, and writ of certiorari dismissed, with fifty dollars costs, on authority of *People ex rel. Doscher v. Sisson* (180 App. Div. 464), decided herewith. Thomas, Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

*Decision by the Presiding Justice on Application to Appeal from the Appellate Term.*

JANE COHEN, Respondent, *v.* JEWEL LEWIS, Appellant.— Application denied, with ten dollars costs.

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### THIRD DEPARTMENT, NOVEMBER, 1917.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* WILLIAM PAYNE and MARTHA PAYNE, Appellants.

*Ejectment — parties — tenants in common.*

Appeal from an order of the Supreme Court, entered in the Hamilton county clerk's office October 30, 1916.

PER CURIAM: Assuming that the plaintiff acquired no title under the tax deeds, it unquestionably under the Waldo partition action acquired title to an undivided interest in the property, and could by proper amendment if necessary make all the alleged tenants in common parties to this action, and maintain ejectment against the defendants who have failed to connect themselves in any manner with the title. It is clear that the defendants in no aspect of the case can succeed. Order unanimously affirmed, with ten dollars costs and disbursements.

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ETTAH M. S. KANALEY, Appellant, *v.* GENERAL ELECTRIC COMPANY, Respondent.

*Master and servant — free medical attendance to employees — negligence.*

Appeal by the plaintiff from a judgment of the Supreme Court, entered in the Schenectady county clerk's office on the 15th day of March, 1917.

Judgment affirmed, with costs. All concurred, except Kellogg, P. J., dissenting, with memorandum, in which Lyon, J., concurred.

KELLOGG, P. J. (dissenting): The plaintiff had *prima facie* established a cause of action. A corporation may maintain a hospital for the treatment of its sick and injured employees. When it establishes a hospital for such

purpose, and assumes the treatment of its employees, it incurs an obligation arising out of and in the course of the employment which is not a mere gratuity but is part of the contract of service. (*People ex rel. Metropolitan Life Ins. Co. v. Hotchkiss*, 136 App. Div. 150; Workmen's Compensation Law, § 13.) The defendant, therefore, owed to the plaintiff, while treating her in the hospital, the duty of furnishing proper, skillful and up-to-date treatment by persons qualified and competent to give such treatment. While receiving the treatment, the relations between the plaintiff and the defendant were not changed and she remained its employee. The treatment was a mere incident growing out of and a part of the relations of master and servant. Plaintiff understood, and had a right to understand, that she was being treated by a regularly licensed physician and surgeon. That was an assurance of safety to her. The fact that the employee furnishing the treatment was not a licensed physician or surgeon, and the unskillful manner in which he treated the plaintiff, put the defendant upon its defense. Was it careless in employing such a man to perform such work? Was it the act of a reasonably careful person to put this unlicensed man, with his lack of skill and without knowledge of surgery, in charge of the hospital and to put in his hands medicine and surgical instruments for use at his discretion? There is, therefore, some evidence tending to show that the defendant was negligent in putting the plaintiff under the treatment accorded her. I favor a reversal. Lyon, J., concurred.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of CHARLES KRONBERGER, Respondent, for Compensation under the Workmen's Compensation Law, v. HARLEM BOTTLE COMPANY, Employer, and NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier, Appellants.

*Workmen's Compensation Law* — junk dealer — storing bottles — hazardous employment.

Appeal from an award of the State Industrial Commission, made on the 13th day of March, 1917.

Award reversed and claim dismissed, on the authority of *Roberto v. Schmadeke, Inc.* (180 App. Div. 143), and *Walsh v. Woolworth Co.* (Id. 120), decided herewith. All concurred, except Kellogg, P. J., dissenting, with memorandum.

KELLOGG, P. J. (dissenting): In *Matter of Mihm v. Hussey* (169 App. Div. 743) we held by a divided court that a wholesale produce dealer who stored his produce, until sold, in a building kept for such storage, was not engaged in warehousing or storage within group 29 of section 2 of the Workmen's Compensation Law. Immediately following that decision that group was amended by adding after the word "storage" the words "of all kinds and storage for hire."\* The amendment, we infer from the state-

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\* Consol. Laws, chap. 67 (Laws of 1914, chap. 41), § 2, group 29, as amd. by Laws of 1916, chap. 622.— [REP.]

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ment of the Commission, was procured by it to meet the *Mihm* case. Here the employer's business was keeping men upon the city dumps, picking bottles from the junk and refuse there, taking them to its warehouse, washing, steaming and sorting them according to kind, and keeping them until sold. It also bought new bottles and bottles from second-hand dealers and junk dealers, wherever offered, by the carload lots, wagon load or by barrels and otherwise. It occupied a building about thirty feet by eighty, in part of which was an office and the remainder was used for storing the bottles. The secretary of the company well defined its business as follows: "Q. Do you do anything else besides buy bottles? A. Buy them and store them inside and sell them,—that's all we do." The Commission found that the business of the employer was that "of junk dealer in respect to bottles, and storage." Ordinarily, the buying of second-hand bottles is not in itself dealing in junk as that word is generally understood, but the men whose business it is to go upon the public dumps of the city of New York, overhauling the junk and refuse there and picking out and removing bottles therefrom, are evidently exposed to the risks and dangers incident to the employment embraced within group 42. But it is unnecessary to determine whether within this beneficial statute the employer might be held to be a dealer in junk with respect to bottles, as found by the Commission, as we conclude he was engaged in storage of some kind within the meaning of group 29. The group should have a liberal construction so as to bring within it, so far as reasonably may be, the employees who are exposed to the risks and dangers ordinarily incident to the business embraced within it. In *Wilmott v. Paton* (4 W. C. C. 65) it was said: "I think that, upon the admitted facts as stated to us, there was clearly a *prima facie* case that these premises were a 'warehouse.' The premises were used for the business of breaking up old iron for sale, and very large quantities of old iron were kept stored in large covered sheds upon the premises." And in *Green v. Britten* (6 W. C. C. 82), upon the same subject, the court says: "Nor can it be limited so as to apply only to a building where the public can send their goods to be stored for them, as in the case of the large furniture repositories. The word is applicable to a building used by the owner for the storage of his own goods, though it has no connection of any sort with water transit. \* \* \* 'While it may be difficult to define "warehouse," I am of opinion that, as used in the Act of 1897,\* it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise.'" In *Armour & Company v. Industrial Board of Illinois* (275 Ill. 328; 114 N. E. Rep. 173) the company, in its building, stored its produce for sale to dealers in Danville and vicinity; fresh meats were kept usually no longer than a week, and smoked meats from one to three weeks. It was held to be within the act† providing

\* See 60 & 61 Vict. chap. 37, § 7.—[R.E.P.]

† See Ill. Laws of 1913, p. 339, § 3. See, also, Hurd's Revised Statutes (1915-1916), pp. 1273, 1274, § 128.—[R.E.P.]

for "the operation of any warehouse or general or terminal store houses." The workmen in such employment are subject to all the hazards and risks attending an employment in a regular storage or warehouse. Their place of employment is in and about the warehouse and in connection with the storing of the merchandise, differing entirely from the employee in the ordinary store which keeps a quantity of merchandise in stock to sell to its regular trade. The employees of the store are salesmen who handle the goods as salesmen. Here the employees' duties are to collect the second-hand bottles, and to place them in the storage and hold them there. We are construing a statute intended for the benefit of the employee and to charge upon the hazardous employment the risks flowing from it. It places the loss from industrial accidents in hazardous employments upon the ultimate consumer and not upon the injured employee. The presumptions of the statute are all with the claimant whose claim is presumed to be within the act. It is not always the question what his business is called, or whether technically he is within the strict letter of the group. The question is — is his employer engaged in a business within the fair spirit of the group? Is his employer using or employing him in the regular performance of his duties, where he is subject to the risks and dangers intended to be covered by the group? Is he fairly within the legislative intent? In this case the employer was fairly engaged in the business of collecting and storing second-hand and other bottles. The storage was of course with the expectation of making a contract of sale at a proper time. I think the Commission was justified in determining, as a matter of fact, that the employer was engaged in a hazardous business and that the employee is entitled to the benefits of the act. I, therefore, favor an affirmance.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of LEO ALPERT, Respondent, for Compensation under the Workmen's Compensation Law, *v. J. C. & W. E. POWERS, Employer, and THE AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier, Appellants.*

*Workmen's Compensation Law — lifting heavy weights — rupture.*

Appeal from an award of the State Industrial Commission, entered in the office of the Commission August 3, 1917, and a continuation thereof.

Award affirmed. All concurred, except Woodward, J., dissenting with opinion, in which Sewell, J., concurred.

WOODWARD, J. (dissenting): The claimant, Leo Alpert, in presenting his demand for compensation, fixes the date of his alleged accident at the tenth day of April, and the hour of the day at three-thirty p. m. In a statement in his own handwriting, which he claims was copied from a statement prepared for him by an agent of the insurance carrier, he says that on the 10th day of April, 1917, "I was doing my usual work on the press I always work on and about 11 a. m. I began to have cramps in my stomach but I kept to work until 12 o'clock, then I took a little rest, laying

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down in the shop at my lunch hour. I started in again at 12:30 and worked until 3:30 when my cramps were so bad I had to go home and saw a doctor that same evening. He said I had a rupture. On April 10th, the day the cramps came on me I was handling paper of the same size and weight as usual and in the usual way; I did not have anything like an accident happen to me. I did not have any extra strain. I can't account for why the rupture should have come." This statement was made four days after the alleged accident. At a hearing before the Commission on the seventh day of May, less than a month from the date of the alleged accident, the claimant testified entirely in harmony with this statement, making no suggestion of its modification in any way, and the Commission made an award, and included in its findings of fact that the claimant "severely strained himself." On the eighteenth day of June, at the suggestion of the attorney for the insurance carrier, this award was called to the attention of the counsel for the Commission, who advised that there was not sufficient evidence to warrant this finding, or to support the award, and advising that a further hearing be had. Acting upon this advice the Commission held a second hearing on the 2d day of July, 1917, at which time the claimant was further examined, and in response to a question by Commissioner Mitchell he testified directly that he felt no unusual strain at the time of the alleged accident. The Commission then struck out the finding that the claimant "severely strained himself," and directed the formulation of new findings. Subsequently, and on the fourteenth day of July, the counsel to the Commission advised still another hearing, at which all of the parties should be present, and at that time the claimant was further examined, obviously with the purpose of inducing him to modify his previous testimony so as to sustain the award, and he was asked to define his understanding of an accident, and this was followed by interrogatories in reference to the statement from which we have already quoted. The claimant explained that this statement was prepared by a Mr. Brooks, apparently connected with the insurance carrier, and that he read it over and at the request of Mr. Brooks copied it in his own handwriting, adding that "I didn't have any experience in any courts or anything like that." This examination brought out no evidence of any particular importance on the question of the accident. The Commission apparently laid stress upon the fact that the claimant had been examined and accepted into a Hebrew insurance organization about four weeks before the alleged accident, although there was no evidence of anything more than a superficial examination, with no special regard to the question of a hernia, which is the difficulty complained of here. The claimant, on this third effort, did testify that the bundle of papers which he was carrying up to the press was of the weight of seventy or eighty pounds, thus materially increasing the weights which he had previously given, but he further testified that he had been lifting the same kind of bundles in the same way for a period of seven or eight years, and evidently did not intend to modify his previous statements as to the character of the work. He was a pressman, and at intervals he was called upon to place bundles of paper upon the elevated feedboard,

and the Commission, after these various hearings, has found as conclusions of fact that "In the course of his employment it was necessary for Leo Alpert to lift bundles of paper weighing from 40 to 60 pounds from the floor to his shoulder and carry each bundle up two or three steps to lay it on the press. The number of times it was necessary to lift and carry such bundles averaged about twenty per day. On said April 10, 1917, while thus working for his employer at his employer's plant and while engaged in the lifting of a bundle of paper weighing about 70 pounds, he sustained a complete right inguinal hernia which will require an operation," and "(4) The injuries to Leo Alpert were accidental injuries and arose out of and in the course of his employment." It is to be recalled that the claimant has not himself ever testified contrary to his statement that there was no accident, and he is the only witness. No one contradicts him. He fixes in his original claim, and in his testimony, the exact hour of the alleged accident; this is placed at three-thirty P. M. of April tenth, and his testimony at page 31 of the record, to the effect that the bundle of paper which he was carrying when he felt the pain weighed about seventy pounds, relates to a time prior to the noon hour, as will be seen from what follows at page 32. In fact, he tells us all through the record that he had what he supposed were cramps during the forenoon; that he felt the pain when he handled the bundles, and that it receded when he took a rest, and he does not claim that the so-called accident happened until three-thirty in the afternoon, and all that he claims then is that the pain grew more severe as he worked, and that he quit at about that time. There is, therefore, no evidence to support the conclusion of fact that the claimant was carrying a bundle weighing about seventy pounds at the time of this alleged accident; he was carrying a bundle of this size, if at all, when he felt the pain, but he felt the pain at least as early as eleven o'clock in the morning. Where are we to find the evidence to sustain the conclusion of fact that "the injuries to Leo Alpert were accidental injuries?" Where was the accident? When did it occur? The claimant does not say that he had anything which could be characterized as an accident; he specially disclaimed it, and while we are to give a liberal construction to the statute, we are not warranted in calling "a sheep's tail a leg" for the sake of bringing a case within the statute. It may not be improper to recur to the fundamental principles underlying the Workmen's Compensation Law, that we may preserve the integrity of the law. We are to read and understand this act in the light of the environment in which it was created, and it all centers around the proposition that there are certain industrial enterprises which are inherently dangerous to life and limb; that when all of the precautions have been taken, still the employee is subjected to dangers — to accidents — which should be compensated as a part of the cost of production. (*See Ives v. South Buffalo R. Co.*, 201 N. Y. 271.) Article 14-a of the Labor Law,\* pronounced unconstitutional in that case, provided in its 215th section\*

\* Consol. Laws, chap. 31 (Laws of 1909, chap. 36), art. 14-a, as added by Laws of 1910, chap. 674. Id. § 215, as thus added.—[RMP.]

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that "this article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen." This same idea runs through the present statute; it is because certain employments are inherently dangerous; because accidents are "inherent, necessary or substantially unavoidable," that a special rule has been provided for them, and when the statute refers to an injury or personal injury it means "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." (Workmen's Compensation Law, § 3, subd. 6.)\* And accidental means, not some refinement of reasoning, but such an accident as is inherent, necessarily or substantially unavoidable — that is the class of accidents which the statute was designed to provide for. Of course, if an accident really happens in a plant classed as hazardous by the statute, the fact that it is one which might happen in another plant without incurring liability is not a reason for denying the compensation; the lesser accident is embraced within the general scope of the statute; but in determining what is an accident we have a right to consider what was in the minds of the framers of the law, and this is afforded by the statute as framed by the Commission appointed to prepare it, and those which have followed it. It was those industries which were "determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen" were involved, that the Commission had in mind, and the accidents contemplated were those which involved "extraordinary risks to the life and limb of workmen," and not such as might by a refinement of reasoning come within the definition of accident. The definite injuries which in the very nature of the occupation were bound to occur were what were to be provided for — the accidents which inhered in these specific enterprises. It did not pretend to provide against occupational diseases, nor to provide for the element of depreciation in the man-power involved in productive labor, but for personal injuries, defined to be "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result" from such accidental injuries. There must be an accident — one of the inherent accidents of the business — and if disease or infection "naturally and unavoidably" resulted therefrom such disease or infection could be included as a part of the injury, but in the absence of an accident there was no liability for disease or infection; and it seems to be well understood in medical circles that hernia is a disease of slow development, which may manifest suddenly

\* See Consol. Laws, chap. 67 (Laws of 1914, chap. 41), § 3, subd. 7, as amd. by Laws of 1916, chap. 622.—[RER.]



under ordinary bodily activities. In other words, the Workmen's Compensation Law does not undertake to go beyond providing compensation for the accidents growing out of occupations which are in and of themselves specially subject to accidents involving "extraordinary risks to the life and limb of workmen engaged therein;" accidents in the ordinary acceptance of that word, the fortuitous and unforeseen bruising and maiming of persons engaged in the enterprises covered by the act. To say that a man engaged in carrying paper to a press, following out the usual practice of years, neither slipping, straining, falling, bumping, or in any manner realizing that anything has occurred different from his every-day experiences, has been injured in an accident, merely because he felt some pain at various times during the day in his abdominal region, and particularly when he was in the act of lifting one of the ordinary parcels, is an abuse of language. He might have had the same experiences if he had merely had cramps, as he describes his condition during the day. This is what he thought he had. It never occurred to him that he had had an accident; he does not now pretend that there was anything in the nature of an accident in the common understanding of that word. The evidence does not support the conclusion of fact, and the award should be set aside and the claim dismissed. Sewell, J., concurred.

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ROBERT L. ANDREWS, Appellant, v. THE COLUMBIA TELEPHONE COMPANY OF HUDSON, NEW YORK, Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

ISIDOR BUXBAUM, as Administrator, etc., of ANNA LOUISE KROLL, Deceased, Respondent, v. HENRY PAULSEN, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide the event, on the ground that the verdict is excessive, unless the plaintiff stipulates to reduce the verdict to \$1,500, in which event the judgment is modified accordingly, and as so modified, judgment and order unanimously affirmed, without costs.

EDGAR T. BRACKETT, Respondent, v. LIDA M. FLEITMANN, Appellant.— Judgment unanimously affirmed, with costs.

STEPHAN L. BARHYDT, Respondent, v. FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs.

JOSEPH E. BEEBE, Respondent, v. BOSTON AND MAINE RAILROAD, Appellant.— Judgment and order reversed and new trial granted, with costs to the appellant to abide the event, on the ground that the damages are excessive, unless the plaintiff stipulates to reduce the verdict to \$1,500, in which event the judgment is modified accordingly, and as modified, judgment and order unanimously affirmed, without costs.

MARGARET J. CALLAGHY, Administratrix, etc., of MARGARET J. CALLAGHY, Deceased, Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY and TROY UNION RAILROAD COMPANY, Appellants.— Judgment and order reversed and new trial granted, with costs to the appellants to abide the event, on the ground that the verdict is excessive, unless the plaintiff stipu-

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lates to reduce the verdict to \$1,500, in which event the judgment is modified accordingly, and as so modified, judgment and order unanimously affirmed, without costs.

GIOVANELLA D'AMIANO, as Administratrix, etc., of ANTONIO D'AMIANO, Deceased, Respondent, v. THE PENNSYLVANIA RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs.

ANNIE FINE, Respondent, v. ISIDORE SILVERMAN and MAX SILVERMAN, Doing Business under the Firm Name and Style of I. SILVERMAN & SON, Appellants.— Judgment and order unanimously affirmed, with costs.

J. JOHN HASSETT, Appellant, v. HARRIET ARNOT RATHBONE, Personally, and as President of T. BRIGGS & Co., and T. BRIGGS & Co., Respondents.— Judgment unanimously affirmed, with costs. Sewell, J., not sitting.

GEORGE B. HAKINS, Appellant, v. AGNES A. BOSTWICK and Others, Defendants, Impleaded with CARLTON J. McEVEN and Another, Surviving Trustees, etc., Respondents.— Interlocutory judgment unanimously affirmed, without costs, with leave to plaintiff to amend on payment of costs in the court below.

EVANETTA HARE, Appellant, v. NEW YORK TELEPHONE COMPANY, Respondent.— Judgment unanimously affirmed, with costs.

OSMAN F. KINLOCH, Respondent, v. AGRICULTURAL INSURANCE COMPANY, Appellant, Impleaded with Another.— Judgment and order unanimously affirmed, with costs.

OSMAN F. KINLOCH, Respondent, v. AGRICULTURAL INSURANCE COMPANY, Appellant, Impleaded with Another.— Order unanimously affirmed, with ten dollars costs and disbursements.

THOMAS M. LOSIE, as Executor, etc., of ARTHUR T. LOSIE, Deceased, Respondent, v. THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant.— Judgment and order unanimously affirmed, with costs.

In the Matter of the Claim of Mrs. E. LUDWIG, Appellant, for Compensation to Herself and Her Children, for the Death of HERMAN LUDWIG, under the Workmen's Compensation Law, v. GROH'S BREWERY COMPANY, Employer, and BREWERS' MUTUAL INDEMNITY INSURANCE COMPANY, Insurer, Respondents.— Decision unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES J. SMYTH, Respondent, for Compensation under the Workmen's Compensation Law, v. PACKARD MOTOR CAR COMPANY OF NEW YORK, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JULIA SAYERS, Widow, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of EDWARD SAYERS, SR., v. BILL, BELL & COMPANY, Employer, and OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurance Carrier, Appellants.— Order unanimously affirmed. Kellogg, P. J., not sitting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES T. CAINE, Respondent, v. GREENHUT COMPANY,

INC., Employer, and CASUALTY COMPANY OF AMERICA, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of PHILIP LEFEVRE, Respondent, for Benefits under the Workmen's Compensation Law, v. FLINN-O'ROURKE COMPANY, INC., Employer and Self-Insurer, Appellant.— Award unanimously affirmed.

Before STATE WORKMEN'S COMPENSATION COMMISSION, Respondent. In the Matter of the Claim of ELIZABETH W. CHASE, Mother, and JESSIE RAMSAY, Grandmother, Respondents, for Compensation under the Workmen's Compensation Law, for the Death of LESLIE R. CHASE, v. FAIRBANKS-MORSE AND COMPANY, Employer, and OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurer, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of TOMMASO BIANCO, Claimant, Respondent, for Compensation to Himself, under the Workmen's Compensation Law, for the Death of LUIGI BIANCO, v. DIANA PAPER COMPANY, Employer, and OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Employer and Insurer, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by FREDERICKA HAWTHORNE, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.— Award unanimously affirmed.

ANNA MANNING, Respondent, v. ELLEN CALLAHAN, Individually, and as Administratrix, etc., Appellant, and Others, Respondents.— Judgment and order unanimously affirmed, with costs. Decision amended so as to read as follows: Judgments and orders unanimously affirmed, with costs against the appellant personally to each of the respondents who appeared and filed briefs.

MERCHANTS' LINE, Appellant, v. WALSH CONSTRUCTION COMPANY, Respondent.— Judgment unanimously affirmed, with costs.

In the Matter of the Application of the BOARD OF WATER SUPPLY OF THE CITY OF NEW YORK, Pursuant to Section 42, Chapter 724 of the Laws of 1905, as Amended by Section 9 of Chapter 314 of the Laws of 1906. DAMAGE COMMISSION No. 4. BROWN & SLOSSON, Appellants; HARRY COOKE and Others, Claimants, Respondents.— Order reversed, with ten dollars costs and disbursements to the appellants, on opinion in *Matter of Board of Water Supply [Bell]* (179 App. Div. 877), decided herewith. All concurred.

In the Matter of the Application of the BOARD OF WATER SUPPLY OF THE CITY OF NEW YORK, Pursuant to Section 42, Chapter 724 of the Laws of 1905, as Amended by Section 9, Chapter 314 of the Laws of 1906. DAMAGE COMMISSION No. 4. BROWN & SLOSSON, Appellants; CLAIR BARNES and Others, Claimants, Respondents.— Order reversed, with ten dollars costs and disbursements to the appellants, on opinion in *Matter of Board of Water Supply [Bell]* (179 App. Div. 877), decided herewith. All concurred.

In the Matter of the Application of the BOARD OF WATER SUPPLY OF THE

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CITY OF NEW YORK, Pursuant to Section 42, Chapter 724, Laws of 1905, as Amended by Section 9, Chapter 314 of the Laws of 1906. DAMAGE COMMISSION No. 4. Second Compensation.— Order modified by reducing the compensation of Commissioner Gibson to \$2,300 and disbursements, and Commissioner Deyo to \$3,000 and disbursements, and as so modified, unanimously affirmed, without costs. All concurred.

In the Matter of the Claim of LAURA A. GORTON, Respondent, for Compensation to Herself and Children under the Workmen's Compensation Law for the Death of WAITE H. GORTON, Deceased Employee, v. EASTMAN KODAK COMPANY, Employer and Self-Insurer, Appellant.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANNA BECKWITH, Respondent, for Compensation for Herself for the Death of WILLIAM BECKWITH, under the Workmen's Compensation Law, v. BASTIAN BROS. COMPANY, Employer, Appellant, and ROYAL INDEMNITY COMPANY, Insurer, Appellant.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of EVA CHAMPINE and RUTH CHAMPINE, for Compensation under the Workmen's Compensation Law for the Death of MOSES CHAMPINE, v. DE GRASSE PAPER COMPANY, Employer; MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of SAMUEL DUBIN, Respondent, for Compensation under the Workmen's Compensation Law, v. JAMES E. HEFFERNAN, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHRISTOPHER FARRELL for Compensation under the Workmen's Compensation Law, v. TERRY & WILLIAMSON STEAMSHIP WORKS, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANNA GRANOVSKY, Widow of WOLF GRANOVSKY, Deceased, Respondent, v. BING & BING CONSTRUCTION COMPANY, Employer, and CASUALTY COMPANY OF AMERICA, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of GIUSEPPE JUDICE (GIUDICI), Respondent, for Compensation under the Workmen's Compensation Law, v. DEGNON CONTRACTING COMPANY, Employer, Self-Insurer, Appellant.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY E. WOOLLEY, Respondent, Arising Out of the Death of IRVING WOOLLEY, for Compensation under the Workmen's Compensation Law, v. GENEVA CUTLERY COMPANY, Employer, and THE AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law to LILLIAN B. GURNETT, Widow, and Three Minor Children, Respondents, for the Death of ALFRED G. GURNETT, v. L. P. ROSS COMPANY, Employer, and THE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARIA BELLAFIORE and Minor Children, Respondents, for Compensation under the Workmen's Compensation Law, v. ROMAN BRONZE WORKS, Employer, and the TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANGELINA NAPPA and Others, Respondents, for Compensation or Death Benefits under the Workmen's Compensation Law, Because of the Death of GREGORIO NAPPA, Employee, v. FLUSHING BAY IMPROVEMENT COMPANY, Employer, and CASUALTY COMPANY OF AMERICA, Insurance Carrier, Appellants.—Award affirmed. All concurred, except Sewell, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of FLORENCE E. O'DELL, Respondent, for Compensation under the Workmen's Compensation Law for the Death of HARRY O'DELL, v. ADIRON-DACK ELECTRIC POWER COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of VICTOR SAVINSKY, Respondent, for Compensation under the Workmen's Compensation Law, v. ISAAC HICKS & SONS, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of WALLACE G. SEE, Respondent, for Compensation under the Workmen's Compensation Law, v. THOMAS C. LUTHER, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ELSIE TEN BROECK, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of RAYMOND TEN BROECK, v. TOWN OF SAUGERTIES and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award reversed and claim dismissed, on the authority of *Matter of Bowne v. Bowne Co.* (221 N. Y. 28). All concurred.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of THOMAS WEBB, Respondent, for Compensation under the Workmen's Compensation Law, v. JOSEPH JOSEPH & BROS. COMPANY, Employer, and CASUALTY COMPANY OF AMERICA, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of TILLIE BURNS and Others, Respondents, for Compensation

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under the Workmen's Compensation Law, v. PRODUCTS MANUFACTURING COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JAMES F. CONLEY, Respondent, for Compensation under the Workmen's Compensation Law, v. THOMAS F. HICKEY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HARRY HOUSE, Respondent, for Compensation under the Workmen's Compensation Law, v. ROBINSON & CARPENTER, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of WILLIAM F. LYNCH, Respondent, for Compensation under the Workmen's Compensation Law, v. JACOB T. ANDERSON, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of SARAH M. STURGIS, Respondent, for Compensation under the Workmen's Compensation Law for the Death of JOHN J. STURGIS, v. KING SEWING MACHINE COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARGARET R. SWANICK, Respondent, for Compensation under the Workmen's Compensation Law, v. SARATOGA MILLING AND GRAIN COMPANY, Employer, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HELEN E. GRIEB and HELEN M. GRIEB, Respondents, for Compensation under the Workmen's Compensation Law for the Death of CHARLES J. GRIEB, v. WILLIAM H. HAMMERLE, Employer, and NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier, Appellant.—Award affirmed. All concurred, except Cochrane, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by ALFRED FAWCETT, Respondent, v. LANGENBACHER BROTHERS, Employer, and NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JOSEPH CLEMENS, Claimant, Respondent, v. CLEMENS & GRELL, Employer, and THE COMMERCIAL CASUALTY INSURANCE COMPANY, Appellant.—Motion to dismiss denied. Award reversed and claim dismissed on the authority of *Matter of Bowne v. Bowne Co.* (221 N. Y. 28). All concurred.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of

the Claim of ROBERT F. MATHEWS, Claimant, Respondent, v. GENERAL ELECTRIC COMPANY, Self-Insurer, Appellant.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY J. McNEIL, Respondent, for Compensation for Herself and Children under the Workmen's Compensation Law, for the Death of Her Husband, JOHN McNEIL, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by HENRIETTA BONKE, Mother, and ALBERT H. BONKE, Father, of CARL J. BONKE, Deceased, Respondents, for the Death of CARL J. BONKE, v. JACOB SHIPPERS & SON, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ELIZABETH RUANE, Widow of JOHN RUANE, Appellant, for Compensation under the Workmen's Compensation Law, v. THE CITY OF NEW YORK (Department of Plants and Structures), Respondent.—Decision unanimously affirmed.

THE NATIONAL BANK OF COXSACKIE, Respondent, v. MARION L. POST, Appellant.—Judgment and order unanimously affirmed, with costs.

FRANK OKONSKI, Respondent, v. SCHENECTADY RAILWAY COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. VINCENT BERGSTROM, Appellant.—Judgment of conviction affirmed on the authority of *People ex rel. Bender v. Joyce* (174 App. Div. 574). All concurred, except Woodward, J., dissenting on the authority of *People v. Hemleb* (127 App. Div. 356).

ROSIE ROSLAFSKY, an Infant, by LOUIS ROSLAFSKY, Her Guardian ad Litem, Respondent, v. BINGHAMTON RAILWAY COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs.

ALBERT R. SABINE, as Administrator, etc., Appellant, v. THE STATE OF NEW YORK, Respondent.—Judgment affirmed, with costs. All concurred, except Woodward, J., dissenting.

JOHN B. SHORT, Respondent, v. JOHN GOUNDRY, Appellant.—Judgment and order unanimously affirmed, with costs.

LANELLE M. SHEARMAN, Respondent, v. THE STATE OF NEW YORK, Appellant.—Judgment affirmed, with costs. All concurred, except Cochrane and Sewell, JJ., dissenting.

CLARA ELIZABETH SHARP, as Administratrix, etc., of ISAAC SHARP, Deceased, Respondent, Appellant, v. CITY OF HUDSON, Respondent; BELMAR CONTRACTING COMPANY, INC., Appellant.—Judgment and order affirmed, with costs in favor of the plaintiff against the defendant Belmar Contracting Company, and with costs in favor of the defendant City of Hudson against the plaintiff. All concurred.

EUGENE VERMILYEA, Appellant, v. LAWRENCE MURRAY, Respondent.—Judgment and order unanimously affirmed, with costs.

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JOHN WINN, Appellant, v. THE STATE OF NEW YORK, Respondent.—Judgment unanimously affirmed, with costs.

ROBERT A. WARD, as Administrator, etc., of WILLIAM WARD, Deceased, Appellant, v. BOSTON AND MAINE RAILROAD and TROY UNION RAILROAD COMPANY, Respondents.—Judgment affirmed, with costs. All concurred, except Kellogg, P. J., and Lyon, J., who voted for a reversal as to the Boston and Maine Railroad.

MARY W. HAYNES, Appellant, v. ELMIRA WATER, LIGHT AND RAILROAD COMPANY, Respondent.—Sent to the Fourth Department. Sewell, J., not sitting.

LAND AND LAKE ASSOCIATION, Appellant, v. ALLEN CONKLIN, Respondent.—Sent to the Fourth Department. Cochrane, J., not sitting.

LAND AND LAKE ASSOCIATION, Appellant, v. WALTER H. BEARDSLEY, Respondent.—Sent to the Fourth Department. Cochrane, J., not sitting.

EGBERT W. AIKINS, Respondent, v. HENRY W. SEIGEL, Appellant.—Judgment unanimously affirmed, with costs.

WALTER BISSELL, as Administrator, etc., of IRVING BISSELL, Deceased, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs.

FRANK S. BRODT, Respondent, v. NEW YORK TELEPHONE COMPANY and ABNER G. SMITH, Appellants.—Judgment and order unanimously affirmed, with costs.

FLORENCE CAFFERTY, Respondent, v. SOUTHERN TIER PUBLISHING COMPANY, Appellant, Impleaded with DANIEL J. KELLY.—Motion denied.

ROBERT M. CHALMERS and Others, Doing Business under the Firm Name and Style of JOHN G. MYERS COMPANY, Respondents, v. FLORENCE I. REYNOLDS, Appellant, and FREDERICK R. BENDER, Defendant.—Order affirmed, with ten dollars costs and disbursements. All concurred, except Lyon, J., dissenting.

CHARLES E. COURTNEY, Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

GEORGE H. CLIFFORD, Respondent, v. VASCO P. ABBOTT, Appellant.—Judgment affirmed, with costs. All concurred, except Kellogg, P. J., dissenting.

ALBERT A. HELLWIG, Respondent, v. CITY OF GLOVERSVILLE, Appellant.—Judgment unanimously affirmed, with costs.

DANIEL KANAUGH, as Administrator, etc., of CATHERINE H. KANAUGH, Deceased, Respondent, v. GEORGE H. UNDERHILL, Appellant.—Order reversed, with ten dollars costs and disbursements; default opened and judgment vacated, on the condition that the defendant file a stipulation agreeing to take the testimony of the plaintiff, if desired, before Charles O. Pratt, Esq., counselor at law, who is hereby appointed a referee for such purpose, and pays said ten dollars costs and disbursements, and thirty dollars trial fees and disbursements of the Trial Term. If such stipulation



is not filed, and said costs paid, order unanimously affirmed, with ten dollars costs and disbursements. All concurred.

WILLIAM P. LOGAN, Appellant, v. ALBERT GUGGENHEIM, Respondent.— Order reversed, with costs, and verdict reinstated, on the ground that the error pointed out by the trial justice as a ground for setting aside the verdict was harmless and not prejudicial to the defendant. All concurred.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by FREDERICKA HAWTHORNE, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.— Motion denied.

In the Matter of the Claim of MARY J. McNEIL, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.— Motion denied.

WILLIAM MANKES, Respondent, v. LOUIS FISHMAN, Appellant.— The parties having stipulated on the argument that the question involved on the appeal be decided on this motion: Motion to dismiss appeal denied, without costs. Order appealed from reversed, without costs, and the motion of the defendant granted, without costs.

In the Matter of the Claim of ALFRED BYLOW, Respondent, for Compensation or Death Benefits under the Workmen's Compensation Law, Because of the Death of ELWIN KINGSLEY, v. ST. REGIS PAPER COMPANY, Employer, and THE FIRST MUTUAL LIABILITY INSURANCE COMPANY OF NEW YORK, Insurance Carrier, Appellants.— Motion denied.

In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by DENNIS E. HYNES, Respondent, v. THE PULLMAN COMPANY, Employer and Self-Insurer, Appellant.— Motion granted.

In the Matter of the Judicial Settlement of the Accounts of FRANK H. MCKINNON, as Administrator, etc., of JAMES R. BAUMES, Deceased. FRANK H. MCKINNON, Respondent, v. JULIUS E. HALL, as Administrator, etc., of ROBERT CARTWRIGHT, Appellant.— Motion to dismiss appeal denied; the court finding that the time in which to appeal was not limited under section 1351 of the Code of Civil Procedure. Either party upon the argument may use any exhibit not printed in the record.

E. HARRY MIERSON, Respondent, v. CITY OF GLOVERSVILLE, Appellant.— Judgment unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of PETER MODRA, Respondent, for Compensation under the Workmen's Compensation Law, Respondent, v. JOHN LITTLE, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Award affirmed. All concurred, except Kellogg, P. J., and Lyon, J., dissenting on authority of *Matter of Grammici v. Zinn* (219 N. Y. 322); *Matter of Kanzer v. Acorn Mfg. Co.* (Id. 326); *Matter of Boscarino v. Carfagno & Dragonette* (220 id. 323), and *Carkey v. Island Paper Co.* (177 App. Div. 73).

MARY MALONE, Appellant, v. KATHERINE HIRSCH, Respondent.— Judgment of the County Court unanimously affirmed, with costs, on

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the opinion of Salisbury, County Judge (Reported in 102 Misc. Rep. 724).

In the Matter of the Application of ROBERT C. POSKANZER, as Trustee of the Bankrupt Estate of FLORENCE I. REYNOLDS, Respondent, for the Issuance of an Execution, under Section 1391 of the Code of Civil Procedure of the State of New York, against the Income from Certain Trust Funds of Said FLORENCE I. REYNOLDS, in the Hands of CHARLES C. BULLOCK, JR., as Trustee under the Last Will and Testament of MATTHEW H. BENDER, Deceased, Appellant, and Funds to Come into His Hands under Said Will.—Order affirmed, with ten dollars costs and disbursements, on the opinion of Nicholls, J., at Special Term (Reported in 101 Misc. Rep. 100). All concurred, except Kellogg, P. J., and Lyon, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claims of GEORGE W. SWART and JANE SWART, Respondents, for Compensation under the Workmen's Compensation Law, for the Injury and Death of GEORGE W. SWART, v. TOWN OF SHELBY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award reversed upon the ground that the failure to serve notice was not properly excused; and matter remitted to the Commission for further action. All concurred, except Lyon and Sewell, JJ., dissenting.

In the Matter of the Estate of F. AUGUSTUS HEINZE, Deceased. In the Matter of the Application of WALTER A. FULLERTON, as Administrator, to Recover Possession of Certain Stock of CONSOLIDATED WEST DOME MINES, LTD. EMPIRE KAOLIN COMPANY, Appellant; WALTER A. FULLERTON, as Administrator, etc., and Others, Respondents.—Decree reversed, and proceeding dismissed, with separate costs to each appellant, on the opinion of Woodward, J., in *Matter of Heinze* (179 App. Div. 453; 165 N. Y. Supp. 1017). All concurred.

In the Matter of the Construction of the Will of JULIA A. BRONSON, Deceased. GEORGE L. MERRITT, Individually and as Executor, etc., of JULIA A. BRONSON, Deceased, and EDITH GILES, Appellants; C. WILLIS BRONSON, Respondent.—Decree unanimously affirmed, with costs to be paid by the appellants personally.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of LIZZIE GARDNER, Respondent, for Compensation to Herself and Children under the Workmen's Compensation Law, for the Death of EMMETT M. GARDNER, v. HORSEHEADS CONSTRUCTION COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Appellants.—Award affirmed. All concurred, except Woodward, J., dissenting.

FRANK OKONSKI, Respondent, v. SCHENECTADY RAILWAY COMPANY, Appellant.—Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator, v. STATE BOARD OF TAX COMMISSIONERS and CITY OF POUGHKEEPSIE. (Taxes 1908 to 1913, inclusive.)—Motion granted modifying former order so as merely to certify to the Court of Appeals that in the opinion of this court

a question of law is involved which ought to be reviewed by the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DEWEY MILLER, Appellant, v. JOHN B. FISKE, as Sheriff of the County of Clinton, N. Y., Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred, except Woodward, J., dissenting.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HARLAN P. BRACE, Appellant.— Order reversed, with ten dollars costs and disbursements to the respondent, and motion to open default granted, upon payment of all costs since the commencement of the action, including ten dollars costs of motion. All concurred.

FRANK E. TAFT, Plaintiff, v. FRANK A. BRONSON, Defendant.— Motion denied.

GEORGE TAYLOR, as Receiver of the Firm of GEORGE D. HARRIS & COMPANY, Appellant, v. MICHAEL D. KELLEY and HARRY P. KELLEY, Defendants, and THOMAS B. BUDINGER, Respondent.— Order unanimously affirmed, without costs.

LEONARD H. WALTERS, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred, except Kellogg, P. J., and Sewell, J., dissenting on the ground that the verdict is excessive.

HELEN READE, Appellant, v. WILLIAM J. HALPIN and Another, Defendants, Impleaded with FREEMAN H. MUNSON, Respondent.— Decision amended so as to read as follows: Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Opinion by Sewell, J. All concurred. (See 180 App. Div. 161.)

BENTON TURNER, Appellant, v. THE MERCHANTS' NATIONAL BANK OF PLATTSBURG, N. Y., Respondent.— Order unanimously affirmed, with ten dollars costs and disbursements.

RANSOM WILSEY, Respondent, v. FRANK LOVELAND and Another, Appellants.— Decision amended so as to read as follows: Judgment modified by reducing the recovery to seventeen dollars, the value of the trees cut west of the strip reserved, and striking out the award of costs in the court below, and awarding costs to the defendants, and as so modified unanimously affirmed, without costs. Opinion by Sewell, J. (See 180 App. Div. 279.)

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#### FOURTH DEPARTMENT, NOVEMBER, 1917.

MARION L. EVANS, as Executrix, etc., of GRIFFITH EVANS, Deceased, Respondent, v. SUPREME COUNCIL OF THE ROYAL ARCANUM, and JAMES E. BIRD, Regent of Rome Council, No. 150, of the Royal Arcanum, Appellants.

*Insurance — benevolent association — suspending member — effect of injunction.*

Appeal from a judgment of the Supreme Court, entered in the Oneida county clerk's office February 24, 1917.

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Judgment affirmed, with costs, upon the opinion of Crouch, J., delivered at Special Term. [Reported in 101 Misc. Rep. 720.] All concurred, except Kruse, P. J., and Foote, J., who dissented, each in a separate memorandum, and voted for reversal.

KRUSE, P. J. (dissenting): I am unable to see how the injunction order kept the life insurance certificate in force without payment of the assessments in full. As it seems to me, the most the injunction did was to prevent the defendant from taking affirmative action to suspend or forfeit the certificate. But I think no affirmative action was necessary upon the part of the defendant to forfeit this certificate. While the injunction order may have had the effect to prevent the member from being suspended from the ordinary lodge privileges, I think it did not have the effect to keep the insurance in effect. If I am right so far it is not necessary to consider the question as to whether the plaintiff could be substituted in this action and recover upon the certificate. Furthermore, it is claimed that question has been decided in her favor by our previous decision, which affirmed the order of substitution. (*Evans v. Supreme Council, Royal Arcanum*, 171 App. Div. 884.)

FOOTE, J. (dissenting): This action was begun by Griffith Evans in his lifetime to have it adjudged that the increase in the amount of his dues and assessments in the defendant company violated his contract rights with defendant and was invalid as to him. The sole object of the action was to maintain Evans' supposed right to continue his membership at the old rate of assessment. The injunction undertook to protect him in this right, in case it was adjudged to be his. It attempted nothing more. He did not ask to have his status preserved to permit him to pay the increased rates if held to be valid, nor did the injunction purport to do so. He did not state an intention to pay the increased rates if found valid, nor did the undertaking bind him or his sureties to do so. For all that appears, it was not his intention to continue his membership unless he could secure an adjudication entitling him to do so at the old rate of assessment. Under these circumstances, even if the effect of the injunction was to prevent his suspension from membership for failure to pay the increased rates if found to be unauthorized, it did not, I think, have that effect if authorized and valid. He took the chance of successfully maintaining his contention in that respect, and if he failed, of losing his right to membership. We did not pass upon this question in affirming the order permitting the plaintiff to be substituted to continue the action. I think the judgment should be reversed and the complaint dismissed, with costs.

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JOHN DZINGELEWSKI, as Administrator, etc., Respondent, v. THE CITY OF SYRACUSE, Appellant.—Judgment and order affirmed, with costs. All concurred.

JANE WADE, Appellant, v. NEW YORK STATE RAILWAYS, Respondent.—Judgment affirmed, with costs. All concurred.

INEZ R. HARTLEY, Respondent, v. JAMES MYRON RINGER, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that the trial court erred in instructing the jury

that if the contract was a blank as to compensation for the services of the plaintiff, the plaintiff was entitled as matter of law to recover the reasonable value of her services. All concurred.

W. JEFFERSON HAYES, Respondent, v. TOWN OF ASHFORD, Appellant.— Judgment affirmed, with costs. All concurred.

SAMUEL W. LUITWIELER, as a Director, etc., Appellant, v. WILLIAM LIVINGSTON and Others, Respondents.— Judgment affirmed, with costs. All concurred.

EDWARD P. HARTNETT, Respondent, v. MARY E. HUDSON, Appellant, Impleaded with Others.— Appeal dismissed unless appellants shall file and serve briefs by November twenty-seventh.

CITY OF BUFFALO, Respondent, v. HAMBURG RAILWAY COMPANY and Others, Appellants.— Appeals dismissed, without costs, upon stipulation filed.

ANNA WILLIAMS, Appellant, v. THE CITY OF BUFFALO, Respondent.— Motion granted and appeal dismissed, with costs.

ELIZABETH GIBLIN, Appellant, v. THE CITY OF BUFFALO, Respondent.— Motion granted and appeal dismissed, with costs.

In the Matter of the Voluntary Dissolution of L. SLOTKIN & Co., a Corporation.— Motion granted and appeal dismissed.

CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff, v. PITTSBURGH, SHAWMUT AND NORTHERN RAILROAD COMPANY and Others, Respondents. CENTRAL TRUST COMPANY OF NEW YORK and Others, Appearing Specially, etc., Appellants.— Motion for leave to appeal to Court of Appeals granted and question for review certified.

CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff, v. PITTSBURGH, SHAWMUT AND NORTHERN RAILROAD COMPANY and Others, Respondents. CENTRAL TRUST COMPANY OF NEW YORK and Others, Appearing Specially, etc., Appellants.— Motion for leave to appeal to Court of Appeals granted and question for review certified.

TERESA PILO, as Administratrix, etc., Appellant, v. LEHIGH VALLEY RAILROAD COMPANY, Respondent.— Appeal dismissed, without costs, upon stipulation filed.

In the Matter of the Application of NORMAN R. PAWLEY, Appellant, as Executor, etc., of ELIZABETH ANN PAWLEY, Deceased, for a Discovery against J. FRED EVANS, Respondent.— Appeal dismissed, without costs, upon stipulation filed.

STEPHEN A. BUTTS, as Administrator, etc., Respondent, v. CHARLES E. ELLIS, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, 1. That the verdict is against the weight of the evidence as to the finding that the defendant sold wood alcohol or that the deceased came to his death from wood alcohol poisoning. 2. That evidence of the witness Alverson as to conversations had with Dr. Buchanan was improperly admitted. All concurred, De Angelis, J., upon the last ground stated only, except Foote, J., who dissented and voted for affirmance.

AQUILA S. FERRAINOLO, Appellant, v. THE WEST END BREWING COMPANY and Another, Respondents.— Judgment affirmed, with costs. All concurred.

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NATALIE GEORGER JEWETT, as Administratrix, etc., Respondent, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

JESSE G. W. KREISS, Respondent, v. ÆTNA LIFE INSURANCE COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred, except Merrell and De Angelis, JJ., who dissented and voted for reversal and dismissal of the complaint.

MABEL L. LUTHER, by FRANKLIN L. METCALF, Her Guardian ad Litem, Respondent, v. CITY OF DUNKIRK and Others, Appellants, Impleaded with Another.— Judgment and order affirmed, with costs. All concurred.

JOHN GEIGER, SR., Appellant, v. FRED C. BROOKS and Another, Respondents.— Judgment affirmed, with costs. All concurred.

WESTERN ASBESTOS MAGNESIA COMPANY, Respondent, v. JOHN W. DANFORTH COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

JOSEPHINE C. CASE, Respondent, v. PHILIP A. CASE, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred.

VINCENZO GUARINO, Respondent, v. LUISA GUGINO, as President of the CONGREGA DELLA MADRE ADDOLORATA OF BUFFALO, NEW YORK, Appellant.— Order and judgment modified so as to direct a new trial in Buffalo City Court, with costs to plaintiff in this court and in the Special Term to abide the event. All concurred.

MARY E. CAMERON, Respondent, v. NATIONAL CASUALTY COMPANY, Appellant.— Order modified so as to require that the plaintiff furnish the defendant with a bill of particulars as to the place and agency where the several payments of premiums by the insured are claimed to have been made, and as so modified affirmed, without costs of this appeal to either party. All concurred.

BERT G. TIFFANY and Another, Doing Business under the Firm Name, etc., Respondents, v. ALMA J. LEET and Others, as Administrators, etc., Appellants, Impleaded with Others.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, but without prejudice to another application by plaintiffs upon proper papers to amend their complaint, if so advised, upon the authority of *Quarantiello v. Grand Trunk R. Co.* (145 App. Div. 138). All concurred; Lambert, J., not sitting.

FRANK B. HODGES and Others, as Trustees, etc., Respondents, v. SALT SPRINGS NATIONAL BANK, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred; Lambert, J., not sitting.

WILLIAM H. EDWARDS and Others, Respondents, v. THE PEOPLE OF THE STATE OF NEW YORK and EDWARD F. STEIN, as Administrator, etc., Appellants.— Motion of defendant Stein for leave to appeal to Court of Appeals granted.

AMERICAN WOOLEN COMPANY OF NEW YORK, Plaintiff, v. MICHAEL C. SIMON, Defendant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

EMBALMERS SUPPLY COMPANY, Appellant, v. FRANK N. ROWE, Respondent.— Motion for reargument denied, with ten dollars costs.

FREDERICK E. FRIEDMAN, Appellant, v. CHARLES BENDER, as President, etc., Respondent.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

JOHN S. SMITH, Respondent, v. ALABAMA LUMBER AND COOPERAGE COMPANY, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

In the Matter of the Probate of the Last Will and Testament of ELIZABETH G. FAULKNER, Deceased.— Motion to vacate order of dismissal denied, with ten dollars costs.

ARDEEN E. RICHMOND, Appellant, v. MARTHA E. QUICK and Others, Respondents.— Motion to dismiss appeal granted, unless appellant shall file and serve printed papers on appeal and printed briefs on or before November thirtieth, pay to respondents' attorney ten dollars, and be ready to argue the appeal on December 3, 1917.

JOHN N. WILLIAMSON, Respondent, v. ELABORATED READY ROOFING COMPANY, Appellant.— Motion for leave to withdraw appeal denied, without costs. Motion to dismiss appeal granted, and appeal dismissed, with costs.

WILLIAM H. STEADMAN, Appellant, v. HAZEL SHIMMIN and Others, Respondents.— From an examination of the stenographer's minutes we find no grounds for reversal; nevertheless, if the appellant desires to prosecute his appeal, he may have thirty days after service of copy of this order within which to file and serve the printed papers on appeal, and in case of his failure to do so, the motion to dismiss the appeal is granted.

MANION BROTHERS COMPANY, INC., Respondent, v. SENECA ENGINEERING COMPANY and Others, Appellants.— Motion to dismiss appeal granted, unless appellants shall file and serve printed papers on appeal and printed briefs by November thirtieth, pay to respondent's attorney ten dollars, and be ready for argument on December 4, 1917.

CLIFFORD U. McENIRY, an Infant, etc., Appellant, v. THE CITY OF BUFFALO, Respondent.— Order entered upon stipulation filed, substituting Orson J. Weimert as attorney for plaintiff in place of Weimert & Templeton.

GENERAL RAILWAY SIGNAL COMPANY, Respondent, v. THE FI-BO-PAK Co., INC., Appellant.— Appeal dismissed, without costs, and appeal bond canceled, upon stipulation filed.

WILLARD P. SCHANCK and Another, as Committee, etc., Respondents, v. EDWARD L. WALLACE, Appellant, Impleaded, etc. (Action No. 1.) WILLARD P. SCHANCK and Another, as Committee, etc., Respondents, v. EDWARD L. WALLACE, Appellant, Impleaded, etc. (Action No. 2.) — It appearing that the incompetent person for whom plaintiffs were committee died prior to the argument of the appeal, the order of affirmance entered October 20, 1917, is vacated and set aside and a reargument granted. Order entered on stipulation substituting Welling E. Mapes and John A. Levis as temporary administrators of the estate of Harriet A. Van Voorhees, deceased, as parties plaintiff in place of Willard P. Schanck and others, as committee of the person and property of Harriet A. Van Voorhis, an incompetent person.

ANNA WILLIAMS, Appellant, v. THE CITY OF BUFFALO, Respondent.—

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Order of dismissal vacated and cause restored to the calendar, upon condition that plaintiff file and serve printed papers by December first, and briefs by December 5, 1917, upon stipulation filed.

RAFFABE SCARSELLA, Respondent, v. CHARLOTTE D'AMANDA and Others, Appellants.—Motion to dismiss appeal granted, unless appellants shall file and serve printed papers by December third.

IVA COLLEY, an Infant, etc., Respondent, v. ANTHONY THOMAS, Appellant.—Appeal dismissed, without costs, upon stipulation filed.

ELLA R. CASTLE, Respondent, v. JAMES C. CASTLE, Appellant.—Final order of dismissal entered upon affidavit filed by respondent's attorney showing that appellant has failed to comply with the terms of order entered October 18, 1917.

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### FIRST DEPARTMENT, DECEMBER, 1917.

In the Matter of the Joint Petition of ALBERT G. WEED, as General Guardian of ROLAND D. J. RAUGHT, a Minor, and EVERETT F. WARRINGTON, as General Guardian, etc., Respondents, for the Appointment of Said ALBERT G. WEED and EVERETT F. WARRINGTON, Jointly with the UNION TRUST COMPANY OF NEW YORK, as the Representatives of the Supreme Court, to Execute a Certain Trust.

NETTIE RAUGHT, Appellant.

*Guardian and ward — trustees — powers of Supreme Court.*

Appeal by Nettie Raught, one of the legatees named in the will of Roland D. Jones, deceased, from an order of the Supreme Court, entered in the New York county clerk's office November 1, 1916, appointing trustees to execute a trust created by said will, and denying her motion for the appointment of a receiver.

PER CURIAM: We have carefully examined the record and think, under the circumstances as disclosed by it, that the action of the court in appointing the guardian *ad litem* for the infant Raught and the appointment of trustees other than the petitioners, was a wise exercise of its judicial discretion. The power to appoint trustees where a trust is created by a will and no trustee named therein is vested in the Supreme Court, exclusively, as successor to the Court of Chancery. The decree, however, should be modified. The allowances are directed to be paid by the administrators with the will annexed, who are not parties to this proceeding. The allowances should be directed to be paid by the trustees out of the first moneys of the trust that come into their hands, together with the costs of this appeal to all the parties who have filed briefs. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ. Decree modified as stated in opinion. Order to be settled on notice.



HELEN SPEER, Appellant, v. SAMUEL STEINFELD and LEO STEINFELD, Respondents.

Appeal from an order of the Supreme Court, entered in the New York county clerk's office October 24, 1917, granting the defendants' motion for a bill of particulars in certain respects and as to others denying the same.

PER CURIAM: The order appealed from is modified by striking from item No. 3 of the demand for a bill of particulars the following: "When, where and in what manner defendants neglected, refused and failed to manufacture a reasonable quantity of said furniture and articles for sale;" and "when, where and in what manner, and what articles of furniture defendants neglected, failed and refused to burn in, stencil, label or brand in a suitable manner, and to whom and when large orders were sold and distributed by defendants without such imprint, denoting that said furniture was designed by plaintiff, and the amount of such orders; and the names and addresses of the persons giving such orders to defendants." And by striking out item 5. And as so modified affirmed, without costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ. Order modified as stated in opinion, and as modified affirmed, without costs. Order to be settled on notice.

ROSA WULFF, Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.

Appeal from an order of the Supreme Court, entered in the New York county clerk's office November 20, 1917, granting a motion to resettle an order setting aside a verdict and ordering a new trial.

PER CURIAM: The order appealed from is modified by imposing the following terms as conditions for the granting of the resettlement of the order desired: (1) That plaintiff be allowed to discontinue her appeal from the original order without costs; (2) that plaintiff be allowed to withdraw the papers heretofore filed on said appeal and that defendant return such papers therein as may have been served on it, and (3) that defendant pay for the printing of plaintiff's brief on the appeal from the original order, and of the resettled order upon a new appeal; and as so modified affirmed, with ten dollars costs and disbursements to the appellant. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ. Order modified as stated in opinion, and as modified affirmed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

MATILDA HOYKENDORF, Respondent, v. BRADLEY CONTRACTING COMPANY, Appellant.

*Negligence — finding contrary to evidence.*

Appeal from a judgment of the Supreme Court in favor of the plaintiff, entered in the New York county clerk's office January 31, 1917, upon the verdict of a jury, and also from an order entered denying a motion for a new trial.

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SCOTT, J.: The plaintiff seeks to recover damages for injuries resulting from a fall caused, as it is said, by a defect in the plank pavement covering an excavation in a street rendered necessary by the construction of the Rapid Transit railroad in the city of New York. The parties, by consent, left the question of the defendant's negligence and of plaintiff's contributory negligence to the court, submitting to the jury only the amount of the damages. After deliberation the court directed a verdict to be entered for the plaintiff thus necessarily holding that the defendant had been guilty of negligence. This finding, as we consider, was clearly against the evidence. (*Derby v. Degnon-McLean Contracting Co.*, 112 App. Div. 324; *affd.*, 188 N. Y. 631.) It follows that the judgment and order appealed from must be reversed and the complaint dismissed, with costs in this court and the court below. Clarke, P. J., Laughlin, Dowling and Shearn, JJ., concurred. Judgment and order reversed and complaint dismissed, with costs.

REBECCA SCHRAGER, an Infant, etc., by BERNARD SCHRAGER, Her Guardian ad Litem, Respondent, v. ROGER FOSTER, Appellant.

*Negligence — facts found contrary to evidence.*

Appeal from a judgment in favor of the plaintiff, entered in the New York county clerk's office March 27, 1917, upon the verdict of a jury, and also from an order entered December 22, 1916, denying a motion for a new trial.

SCOTT, J.: The action was for damages resulting from a fall of an iron chimney-top from the roof of a building owned by defendant. The case was submitted to the jury upon a charge consented to by the plaintiff that the latter could not recover unless the jury found that the injury was caused by a fall of the chimney-top immediately from the chimney upon her. Since the jury returned a verdict in favor of the plaintiff it must have found that the chimney-top did so fall. This finding was, as we consider, directly contrary to the physical facts established by uncontradicted evidence. The verdict was consequently against the weight of the evidence and the judgment and order appealed from must be reversed and a new trial granted, with costs to appellant to abide the event. Clarke, P. J., Laughlin, Dowling and Shearn, JJ., concurred. Judgment and order reversed, new trial ordered, costs to appellant to abide event.

MENTOR ETNYRE and Another, as Copartners, etc., Respondents, v. McQUADE STEVEDORING COMPANY, Appellant.— Judgment and order reversed and a new trial ordered, with costs to appellant to abide event, on the ground that the verdict was against the evidence. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

CLIFFORD C. MOORE, as Substituted Trustee, etc., Appellant, v. LEON J. GARCEY and Another, Individually and as Trustees, etc., Respondents.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

CLARA GABRIEL, Appellant, v. WELLS & NEWTON COMPANY OF NEW YORK, Respondent.— Order reversed, with costs, and motion granted on

the ground of the inadequacy of the verdict. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**THE CITY OF NEW YORK, Respondent, v. NATIONAL SURETY COMPANY and Another, Appellants.**— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**MARIA B. FALETTA, as Administratrix, etc., Respondent, v. SIXTY WALL STREET, Appellant.**— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.; Scott and Page, JJ., dissented on the ground that the motion to dismiss the complaint at the close of plaintiff's case for the reason that it did not state a cause of action should have been granted.

**IRENE ZATULOVE, Respondent, v. LONG ISLAND RAILROAD COMPANY, Appellant.**— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. TONY DELISS, Appellant.**— Judgment and order affirmed. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**EAGLE PAPER BOX COMPANY, Appellant, v. GATTI-McQUADE COMPANY, Respondent.**— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**AMELIA J. PHILLIPS, Respondent, v. THE CITY OF NEW YORK, Appellant.**— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**FRANK I. PHILLIPS, Respondent, v. THE CITY OF NEW YORK, Appellant.**— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**GEORGE JACOBSEN, as Administrator, etc., Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.**— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

**In the Matter of the Application of JOHN GORDON, Appellant, to Compel Payment of Assigned Award, etc. (In the Matter of the Application of the CITY OF NEW YORK Relative to Acquiring Title, etc., for the Opening and Extending of Haviland Avenue, etc.) THE EQUITABLE TRUST COMPANY OF NEW YORK, Substituted Trustee, etc., Respondent.**— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

**JOHN CORNELL, Appellant, v. GEORGE ABEL, Respondent.**— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

**IDA TOBIAS, an Infant, etc., Appellant, v. HARRIS LEWIS and Another, Respondents.**— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

**AUGUSTUS B. PIPER, Respondent, v. STANDARD KNITTING MILLS, Appellant.**— Order modified by providing that in lieu of producing the books of the defendant which are in the State of Ohio, the defendant may produce a sworn copy of their contents which relate to the matter specified

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in the order; and as modified affirmed, without costs. No opinion. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

BERTHA GREENBERGER, as Administratrix, etc., Appellant, v. JOHN B. COYLE, as Administrator, etc., Respondent.— Order reversed, with ten dollars costs and disbursements and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

LOUISA B. DIENER, Respondent, v. GUSTAVE CERF, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

EMIL LUNDWALL, Respondent, v. ERIE RAILROAD COMPANY, Appellant.— Order reversed and motion granted, without costs, unless plaintiff serve bill of particulars as stated in order. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

GENEVEA W. WOODRUFF, Respondent, v. OSCAR A. WOODRUFF, Appellant, Impleaded with Another.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

BOY SCOUTS OF AMERICA, Appellant, v. THE UNITED STATES BOY SCOUT, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion granted except as to item 2. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

BOY SCOUTS OF AMERICA, Appellant, v. THE UNITED STATES BOY SCOUT, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion granted. No opinion. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE COMMERCIAL TRUST COMPANY OF NEW YORK, Respondent, v. WILLIAM BRADLEY, Appellant. THE COMMERCIAL TRUST COMPANY OF NEW YORK, Respondent, v. WILLIAM BRADLEY and FRANK BRADLEY, Appellants.— Orders affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.; Shearn, J., dissented.

STEGEMAN MOTOR COMPANY v. AMERICAN FIDELITY COMPANY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THEODORE G. PECK, JR., v. CHARLES B. TOOLE.— Motion granted, without costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ETHEL L. LOWENTHAL v. HENRY LOWENTHAL.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

NEW YORK CENTRAL RAILROAD COMPANY v. DE WINTER & COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

AUGUSTIN LEDWITH v. DAVID S. FLYNN.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

In the Matter of the Application of the LODGE PRINCIPLE AND CIVILITY AND NEW SALERNITANA SOCIETY, ORDER SONS OF ITALY, INC.—Motion granted unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ADOLPH VERSTONDEG v. LUDWIG BECK and Another. FREDERICKA VERSTONDEG v. LUDWIG BECK and Another.—Motions denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. MCKINLEY REALTY AND CONTRACTING COMPANY.—Motion granted unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

JOHN A. KINGSBURY v. JEREMIAH O'NEILL.—Motion granted unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ROBERT G. FRASER v. LILLIAN P. FRASER.—Motion granted, without costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ADAM WIENER v. MUTUAL LIFE INSURANCE COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

HERMAN SACKS and Another v. MAY H. MILLS.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

MAURICE KATZ v. LOUIS SILBERMAN.—Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

EDMUND J. TINSDALE v. JOHN MICHEL.—Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

MAXWELL HAACK v. JEAN BRY IMPORT COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

MONROE STERN v. DANTE CIGAR MANUFACTURING COMPANY.—Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

GUARANTY TRUST COMPANY v. SECOND AVENUE RAILROAD COMPANY.—Motion denied. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

WEST END THEATRE SYNDICATE v. LEE SHUBERT.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

MARTIN ROTHBARTH and Others v. FELIX HERZFELD and Others.—Motion granted, question certified. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

KIELBERT CONSTRUCTION COMPANY v. EDWARD FREY and Another.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

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WILLIAM M. O'CONNOR v. THE CITY OF NEW YORK.— Motion granted; order resettled. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. STEPHEN W. JOHNSON, v. WARDEN AND KEEPER, etc. JOHN D. MOORE v. WARDEN AND KEEPER, etc. MARGARET T. J. CURLEY v. WARDEN AND KEEPER, etc. SEAN CONWAY v. WARDEN AND KEEPER, etc.—Motions denied. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

HOISTING MACHINERY COMPANY v. FEDERAL TERRA COTTA COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ISAAC LOWENFELD and Others v. U. S. FIDELITY AND GUARANTY COMPANY.— Motion for reargument denied; motion for leave to appeal granted. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

COMMERCIAL TRUST COMPANY v. WILLIAM BRADLEY. COMMERCIAL TRUST COMPANY v. WILLIAM BRADLEY and FRANK BRADLEY.— Motions denied. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

SAUL E. ROGERS, as Receiver, v. EDWARD K. BAIRD.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

FRANCES FEUER, an Infant, etc., Appellant, v. GEORGE BECHMAN, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES CUNNINGHAM, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

HUGH H. JONES, Appellant, v. DANIEL P. BERGHEIMER, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

In the Matter of the Transfer Tax upon the Estate of ELIZA S. KERNOCHAN, Deceased. THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; NEILSON WINTHROP and Others, as Executors, etc., Respondents. — Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

In the Matter of the Application of THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK, etc., Respondent, etc. NEW AMSTERDAM GAS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

EDWARD CLARK, Respondent, v. VARIETY, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ANNA HOWARD SHAW, Appellant, v. THE LEHIGH VALLEY RAILROAD COMPANY and Others, Respondents.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

SEFFIE A. PRIOR, Appellant, v. NEW YORK RAILWAYS COMPANY, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.; Shearn, J., dissented.

ALBERT JONES, Respondent, v. RODGERS & HAGERTY, INC., Appellant.— Judgment and order reversed and new trial ordered, with costs to appellant to abide event, on the ground that the verdict with respect to defendant's negligence and plaintiff's freedom from contributory negligence is against the weight of the evidence. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

J. MONROE COLEMAN, Respondent, v. ABRAHAM STEIN, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

EASTERN ASPHALT PAVING COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH DELLIS, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

WILLIAM BRAUN, Respondent, v. MAAS & WALDSTEIN COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

ERIC G. CARLSON and Another, as Administrators de Bonis Non, etc., Respondents, v. OLIN J. STEPHENS, INC., and Another, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BARNETT SMORACK, Appellant.— Judgment and order affirmed. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

MARGARET J. MILLER, Respondent, v. THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Scott, Dowling and Shearn, JJ.

SAMUEL E. ROBINSON v. HATTIE E. RODGERS.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant procure appellant's points to be filed on or before the 28th day of December, 1917. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

GEORGE O. LORD v. UNITED STATES TRANSPORTATION COMPANY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

GEORGE O. LORD v. UNITED STATES TRANSPORTATION COMPANY.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

CAESAR FRANCINI v. G. P. SHERWOOD AND COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ANNE WEINUS v. J. LEWIS WEINBURG.— Application granted. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

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JOSEPH G. KESSLER v. EASTERN ZINC REFINING COMPANY.— Application denied, with ten dollars costs. Stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

REBECCA MATER v. ARTHUR ROTHSTEIN.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

SOPHIE R. H. LEVY v. COMMERCIAL TRUST COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

MARK FRIEDNER v. JACOB SCHENCK.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

WALTER C. NOYES v. FIRST NATIONAL BANK OF NEW YORK.— Motion granted. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

M. WITMARK & SONS v. HALL-BERWIN COMPANY.— Motion for stay granted. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

M. WITMARK & SONS v. HALL-BERWIN COMPANY.— Motion granted; question certified. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ABRAHAM FRANKENBERG v. SAMUEL PERLMAN.— Motion granted; question certified. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

W. H. McELWAIN COMPANY v. LUIGI PRIMAVERA.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

HENRY B. SLAYBACK v. HOWARD T. ALEXANDER.— Motion denied. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of GEORGE H. HOPPER, Deceased.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

HELBURN THOMPSON COMPANY v. ALL AMERICAN MERCANTILE COMPANY.— Motion granted. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

THE PEOPLE of the STATE of NEW YORK ex rel. JOHN J. MURTHA v. BURDETTE G. LEWIS.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ROBERT HOLMES v. EMILY L. JONES.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

FOUR HUNDRED AND SIXTY-ONE EIGHTH AVENUE COMPANY v. CHILDS COMPANY. METROPOLITAN LIFE INSURANCE COMPANY v. CHILDS COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

GEORGE JACOBSEN v. INTERBOROUGH RAPID TRANSIT COMPANY.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.



DOROTHY DALE v. MIRROR FILMS.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

DE LANCEY T. SMITH v. WINDER E. GOLDSBOROUGH.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

JAMES LYNCH v. JOHN T. O'REILLY.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

LAWRENCE E. BROWN v. CHARLES A. ROBINSON.—Motion for stay granted as to so much of the judgment as provides that the instruments referred to be directed to be delivered up and canceled upon their delivery to the clerk of the Supreme Court, to be held pending the appeal to the Court of Appeals to abide the result of said appeal. Order to be settled on notice. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

JOSEPH LEIFER v. MEYER S. SCHEINMAN.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

W. H. McELWAIN COMPANY v. LUIGI PRIMAVERA.—Motion granted. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of FRED P. FRENCH and Another.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

ANSELNO BELOTTI v. ANDREW BICKHARDT and Another.—Motion denied, with leave to renew as stated in order. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

JOHN A. KINGSBURY v. ALBERT JOSKERS.—Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

EMILY A. BARNUM, Appellant, v. FAYETTE S. BARNUM, Respondent.—Judgment affirmed. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

FREDERICK W. WEHRUM, Respondent, v. CHARLES V. WEHRUM, Individually and as Executor, etc., and Others, Appellants, Impleaded with Others.—Judgment affirmed, with costs, on opinion of Page, J., in *Wehrum v. Wehrum* (179 App. Div. 814). Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

HENRY H. JACKSON, Respondent, v. EDITH A. MOHRMANN and Others, Impleaded with JULIUS BLAUNER, as Trustee, etc., Appellant.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

JULIUS BLAUNER, as Trustee in Bankruptcy of the Estate of NATHAN REISLER, a Bankrupt, Appellant, v. MAX SCHEIN and Others, Impleaded with HENRY H. JACKSON, Respondent.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

JOHN A. BLAIR, Respondent, v. TURBO-ELECTRIC CONSTRUCTION COMPANY and Others, Impleaded with HOWARD R. BAYNE, Appellant.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith and Shearn, JJ.

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EMMA HALL, Individually and as Administratrix, etc., Appellant, v. ROBERT McCULLY, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

GEORGE H. WYCKOFF, Appellant, v. G. S. ALEXANDER & Co., Inc., Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

KERAN M. HORAN, Respondent, v. COMMERCIAL ADVERTISER ASSOCIATION, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, on authority of *Williams v. N. Y. Herald Co.* (165 App. Div. 529). Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.; Smith and Shearn, JJ., dissented.

HUGH M. CREIGHTON, Appellant, v. COMMERCIAL ADVERTISER ASSOCIATION, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith and Page, JJ.

DANIEL T. GARRIE, Appellant, v. MIGUEL E. DE AGUIERO, as President of the CONSOLIDATED STOCK EXCHANGE OF NEW YORK, etc., Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.; Page, J., dissented.

RICHARD BLOCH, Respondent, v. BERT N. MARCUS, Appellant. RICHARD BLOCH, Respondent, v. BERT N. MARCUS, Appellant.— Orders affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

LEONA HOLDING CORPORATION, Respondent, v. ERNEST A. BIGELOW and Another, Appellants.— Judgment affirmed, with costs, on opinion of Page, J., on former appeal (176 App. Div. 500). Present — Clarke, P. J., Scott, Smith and Page, JJ.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant, v. THE CITY OF NEW YORK, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

FREDERICK A. BRAUN, Respondent, v. BORDEN'S CONDENSED MILK COMPANY, Appellant, Impleaded with Others.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

NORA HEALY, Respondent, v. NEW YORK OPHTHALMIC HOSPITAL, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

MARGARET L. VARICK, as Executrix, etc., Respondent, v. MARY J. HIGGINS, Individually and as Executrix, etc., Impleaded with MARGARET BURKE, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

LIVINGSTON RADIATOR AND MANUFACTURING COMPANY, Appellant, v. MORTON TRUCK AND TRACTOR COMPANY, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of MARGARET T. SCHLEY, Deceased.— Decree affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Transfer Tax upon the Estate of SAMUEL FOSTER PAUL, Deceased. THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; ERNESTINE FOUNTAIN PAUL, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JERE MORAY, Appellant.— Judgment and order affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

FRANK X. BARRETT, Respondent, v. THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.; Dowling, J., dissented and voted for reversal and reinstatement of verdict. (See 181 App. Div. 892.)

WILLIAM DELVE, Respondent, v. JOSEPH M. DEVERE, Appellant.— Determination affirmed, with costs, and judgment absolute ordered on defendant's stipulation. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.; Smith, J., dissented.

JOSEPH PREM, Appellant, v. CHARLES C. SHAY, as President, etc., and Another, Respondents.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

WILLIAM A. JOHNSTON, Respondent, v. EXHIBITORS TRADE REVIEW, Inc., Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Judicial Settlement of the Account of Proceedings of BENJAMIN BLOSSOM and JOHN N. BLAIR, as Testamentary Trustees under the Will of MINNIE P. C. BLOSSOM, Deceased, Appellants. AMERICAN SURETY COMPANY and Others, Respondents.— Decree affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

DAVID HARRIS, Appellant, v. WALKER M. LEVETT COMPANY, Respondent.— Determination affirmed, with costs, and judgment absolute ordered for defendant on stipulation. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.; Clarke, P. J., dissented.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SAMUEL ABELS, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

FREDERICK BOEHM, LTD., OF LONDON, ENGLAND, Respondent, v. PORT MORRIS CHEMICAL WORKS, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. BELT LINE RAILWAY CORPORATION, Appellant, v. LAWSON PURDY and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

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CHAUTAUQUA PLANING MILL COMPANY, Respondent, v. NORTH SIDE BANK OF BROOKLYN and Another, Appellants, Respondents, Impleaded with Others.—Judgment affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.; Laughlin and Page, JJ., dissented on dissenting opinion in *Standard Sand & Gravel Co. v. City of New York* (172 App. Div. 80).

ROSE LESLIE, Respondent, v. CHARLES DILLINGHAM, Appellant.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce verdict to \$3,500; in which event, judgment as so modified and order affirmed, without costs. No opinion. Order to be settled on notice. Present—Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

TASHEJIAN CARPET CLEANING COMPANY, INC., Respondent, v. PIERRE WARNY and Another, Appellants, Impleaded with Another.—Judgment affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

STANLEY BROWN, an Infant, etc., Respondent, v. NICHOLAS ESCALANTE BATES, Appellant. WILLIS W. BROWN, Respondent, v. NICHOLAS ESCALANTE BATES, Appellant.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, on the ground that the verdict was against the weight of evidence and for errors in the charge, to which defendant took exception. Present—Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

HERMAN OPPENHEIMER, Respondent, v. HERMAN CUIEL, Appellant.—Order affirmed, with ten dollars costs and disbursements; date of examination to be fixed in order. No opinion. Order to be settled on notice. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

GABRIEL A. BOBRICK, Respondent, v. DAVID MACKENZIE, Defendant. SECOND NATIONAL BANK OF HOBOKEN, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

THE CITY OF NEW YORK, Respondent, v. THE NEW YORK AND SOUTH BROOKLYN FERRY AND STEAM TRANSPORTATION COMPANY, Defendant, Impleaded with FRANCIS H. BERGEN, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

WILLIAM C. ECKERSON and Others, as Committee of the Person and Estate of SOPHIA ECKERSON, an Incompetent, Appellants, v. EDITH C. ECKERSON, as Executrix, etc., and Individually, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and order for examination modified as stated in order. No opinion. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

NELLIE SILBERSTEIN, Appellant, v. GERSON SILBERSTEIN, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion granted to the extent of five dollars a week alimony and one hundred dollars counsel fee. No opinion. Order to be settled on notice. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

NELLIE J. SCHWAB, Respondent, v. HENRY E. SCHWAB, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

THE FARMERS' LOAN AND TRUST COMPANY, as Trustee, etc., Appellant, v. MARY A. BARNARD WAGSTAFF and Others, Appellants, Impleaded with MARY G. SHELLY, Respondent, and Others.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.; Scott and Smith, JJ., dissented.

FERD G. HUSTON, Respondent, v. SAMUEL COHEN, Appellant. FERD G. HUSTON, Respondent, v. SAMUEL COHEN, Appellant.— Orders affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

JOSEPH SHAMES, Respondent, v. WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, Appellant.— Determination affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

HERMANN E. GOLDSCHMIDT, Respondent, v. TOWN OF ARCADIA, Appellant.— Order reversed and motion granted. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Application for Letters of Administration with the Will Annexed of the Goods, Chattels and Credits Left Unadministered of THOMAS MOOK, Deceased. JENNIE D. MOOK, Appellant; HARRY C. WILLIAMS, Administrator, etc., Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

FELS & COMPANY, Respondent, v. PHILIPPINE VEGETABLE OIL COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

CHARLES BROCK, Suing for Himself as a Stockholder of the ANTHONY & SCOVILL COMPANY, and on Behalf of Said Company, and All Other Stockholders, etc., Appellant, v. RUEL W. POOR and Others, Respondents.— Order reversed, with ten dollars costs and disbursements, and motion granted. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH CERESIE, Relator, v. THE WARDEN OF THE NEW YORK COUNTY PENITENTIARY, Defendant. THE PEOPLE OF THE STATE OF NEW YORK, Appellant.— Order modified by directing the discharge of the prisoner. No opinion. Order to be settled on notice. Present—Scott, Laughlin, Dowling, Smith and Page, JJ.

HORACE D. NEWSON, Appellant, v. HOGGSON BROTHERS, Respondent.— Order modified by requiring plaintiff to state the value of his services in detail, instead of the value of each item thereof, and as modified affirmed, with ten dollars costs and disbursements to respondent. No opinion. Order to be settled on notice. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Application of JAMES C. THOMAS, JR., Respondent,

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for an Examination of the Ballots Cast in the County of New York for the Office of Alderman of the Twenty-sixth Aldermanic District of the City of New York. FRANK MULLEN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

KINGS COUNTY LIGHTING COMPANY, Appellant, v. EGBURT E. WOODBURY, as Attorney-General of the State of New York, and Another, Impleaded with OSCAR S. STRAUS and Others, Composing the Public Service Commission for the First District of the State of New York, Respondents.— Order modified as stated in order and as modified affirmed, with ten dollars costs and disbursements to respondent. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

HENRY ZIMMERMAN, Appellant, v. EMPIRE MORTGAGE COMPANY, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and order for examination reinstated; date of examination to be fixed in order. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ. Order to be settled on notice.

JACOB GOTTLIEB, Respondent, v. NEW ENGLAND PANAMA HAT COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements; date of examination to be fixed in order. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ. Order to be settled on notice.

SIDNEY ASH, Respondent, v. UNITED TOILET GOODS COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

In the Matter of the Application of MAX SCHWARZ, Respondent, v. JOSEPH ROSENTHAL, Appellant, Impleaded with Another.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, on authority of *Matter of Schlotterer* (105 App. Div. 115) and *Matter of Moto Bloc Import Co., No. 1* (140 id. 532). Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

CUBAN-AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Respondent, v. G. MUSSO COMPANY, a Corporation, and GIUSEPPE MUSSO and Another, Individually and as Directors and Officers, etc., Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

JANE L. COUGHLIN, Appellant, v. JENNIE CROCKER WHITMAN, Respondent. JOSEPH COUGHLIN, Appellant, v. JENNIE CROCKER WHITMAN, Respondent.— Orders modified so as to provide that plaintiffs shall be precluded from giving evidence as to the vicious character of the dog except with respect to the items contained in the amended bill of particulars, with leave to plaintiffs at any time before trial to serve further bills of particulars as to said allegation of vicious propensities, in which case plaintiffs may give evidence with respect to the statements contained in such further amended bill of particulars; and as so modified affirmed, with ten dollars costs and disbursements to appellants. No opinion. Order to be settled on notice. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

JACOB BRENDER, as Administrator, etc., Appellant, v. NEW YORK,

ONTARIO AND WESTERN RAILWAY COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

OSCAR BAMBERGER and Another, Appellants, v. ROBERT C. BEAL, Respondent. ABRAHAM L. MEYER, Appellant, v. ROBERT C. BEAL, Respondent.— Orders affirmed, with ten dollars costs and disbursements; date of examination to be fixed in order. No opinion. Orders to be settled on notice. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

ALEXANDER JUTKOVITZ, Respondent, v. MARYLAND CASUALTY COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

LEON SAMSON, by BARNET SAMSON, His Guardian ad Litem, Appellant, v. THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

HELEN GERTRUDE HART, Respondent, v. ALBERT JOHN HART, Appellant.— Order modified as stated in order and as modified affirmed, without costs. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

UNION TRUST COMPANY OF NEW YORK, Respondent, v. WILLIAM F. DONNELLY, Impleaded with SARAH D. DONOVAN and Another, Appellants, and Others.— Order of June twenty-ninth modified as stated in order and as modified affirmed, without costs. Order of June twenty-eighth affirmed. No opinion. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

MENASHA WOODENWARE COMPANY, Respondent, v. MADELINE ENGLISH LANDECK, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, on the ground that defendant was a resident of the city and State of New York at the time the attachment in question was issued. Present — Scott, Laughlin, Dowling, Smith and Page, JJ.

ANDREW DRESSSEL v. JULIUS M. HANSWER.— Motion granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

EDWARD M. NEARY, Appellant, Respondent, v. GEORGE J. GOULD and Another, Appellants. H. CLAY PIERCE and Others, Respondents.— Judgment affirmed, with one bill of costs to all respondents except Fitzgerald's executors, separate bill of costs to Fitzgerald's executors, and no costs as between plaintiff and Gould and Ramsey. No opinion. Order to be settled on notice. Present — Clarke, P. J., Scott, Smith, Page and Shearn, JJ.

HUGO JOSEPHY and Others v. KANSAS CITY, MEXICO AND ORIENT RAILWAY OF TEXAS.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

HARRY J. STOCKUM v. LAMBERT HOISTING ENGINE COMPANY.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Smith and Page, JJ.

## SECOND DEPARTMENT, DECEMBER, 1917.

OSCAR BAMBERGER and FERDINAND LOEB, Plaintiffs, v. MEYER TRACE and LILLIE TRACE, Defendants.— Motion for stay denied, with ten dollars costs. The defendant Lillie Trace may raise her claim of privilege to any question put upon the examination, but that cannot prevent any examination at all. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

JAMES W. CROOKS and Others, Respondents, v. THE AEOLIAN COMPANY, Appellant.— Motion to resettle order granted, so as to make the decretal part of the order read as follows: It is hereby ordered and adjudged that the judgment and order so appealed from be and the same hereby are unanimously affirmed; that the findings of fact numbered respectively 27, 28, 29, 30, 33, 34 and 35, be reversed, and that the other findings of fact be and are unanimously affirmed, and that the respondents recover of the appellant the costs of this appeal. Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

GEORGE C. DOBBS, Appellant, v. RAYMOND D. POWELL and Others, Respondents.— Motion for reargument denied, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

ANNIE L. DUNN and Another, Respondents, v. EAGLE SAVINGS AND LOAN COMPANY, Appellant.— Motion denied on condition that appellant perfect the appeal, place the case on the calendar for the January, 1918, term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Stapleton, Mills, Rich and Putnam, JJ.

MAY M. GUGEL and Another, Appellants, v. EVERETT S. HISCOX and Another, Respondents. DAISY E. HISCOX ATCHINSON, as Executrix, etc., Appellant.— Motion granted. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

In the Matter of the Petition of ROBERT L. CHAPMAN to Prove the Last Will and Testament of MARTHA E. CHAPMAN, Deceased.— Motion for reargument denied. Present — Stapleton, Mills, Rich and Putnam, JJ.

In the Matter of the Application, etc., for Removal of a Town Clerk, on Complaint of JOHN C. KENNAHAN, against THOMAS O'CONNELL, as Town Clerk of the Town of North Hempstead, etc.— Motion to amend granted, with leave to respondent, within ten days, to answer the amended petition. Present — Stapleton, Mills, Rich and Putnam, JJ.

In the Matter of the Application, etc., for Removal of a Town Clerk, on Complaint of JOHN C. KENNAHAN, against THOMAS O'CONNELL, as Town Clerk of the Town of North Hempstead, etc.— Motion to dismiss the charges specified in the original petition on the ground that the offenses took place in a prior term of office, denied, without prejudice to a reconsideration of the question upon the merits upon the final submission. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

In the Matter of the Application of EMILIO PAUL YASELLI for Admission.



to the Bar.—Application granted. Present—Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

ALMIRIA P. JONES, Respondent, v. EAGLE SAVINGS AND LOAN COMPANY, Appellant.—Motion denied on condition that appellant perfect the appeal, place the case on the calendar for the January, 1918, term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present—Stapleton, Mills, Rich and Putnam, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM H. HALE, Appellant.—Motion denied. Present—Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL F. GLEASON, Respondent, v. LAWSON PURDY and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants.—Motion denied, without costs. Present—Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ.

JESSIE A. SCOTT and Another, Respondents, v. EAGLE SAVINGS AND LOAN COMPANY, Appellant.—Motion denied on condition that appellant perfect the appeal, place the case on the calendar for the January, 1918, term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present—Stapleton, Mills, Rich and Putnam, JJ.

MARGARET SHEA, as Administratrix, etc., Appellant, v. THE CITY OF NEW YORK, Respondent, and Another, Defendant.—Motion for leave to appeal to the Court of Appeals denied. Present—Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

SPRINGFIELD NATIONAL BANK, Respondent, v. EDWARD N. BREITUNG and Others, Appellants, and Others, Defendants.—We are unanimously of opinion that the papers upon which the warrant was granted were sufficient to confer jurisdiction upon the justice granting the same, and the motion is denied, without costs. Present—Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

GARRITT SWIFT and Another, Respondents, v. EAGLE SAVINGS AND LOAN COMPANY, Appellant.—Motion denied on condition that appellant perfect the appeal, place the case on the calendar for the January, 1918, term, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present—Stapleton, Mills, Rich and Putnam, JJ.

UNITED STATES DRAINAGE AND IRRIGATION COMPANY, INC., Appellant, v. DEGNON REALTY AND TERMINAL IMPROVEMENT COMPANY and Another, Respondents, and Another, Defendant.—The order is perfectly plain. It means what it says—that the defendants may answer on payment of the costs imposed by this court, viz., twenty dollars costs and disbursements of the appeal. Motion denied. Present—Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

MARY T. WORTHINGTON, Plaintiff, v. PAUL B. WORTHINGTON, Defendant.—Motion for stay denied, with ten dollars costs. Present—Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MARY T. WORTHINGTON, Plaintiff, v. PAUL B. WORTHINGTON, Defend-

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ant.—Plaintiff's motion for stay denied. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

MARY T. WORTHINGTON, Plaintiff, v. PAUL B. WORTHINGTON, Defendant.—Motion denied, on condition that appellant perfect the appeal, place the case on the calendar for January, 1918, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

WILLIAM ALLINSON, Respondent, v. THE WILLOUGHBY REALTY COMPANY and THE VAN BRUNT REALTY CORPORATION, Appellants, and Others, Defendants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

WILLIAM C. BAKER, Appellant, v. NEW YORK MUNICIPAL RAILWAY CORPORATION and Another, Respondents.—Judgment affirmed, with costs, on the opinion of Mr. Justice Blackmar at Special Term for Trials. (Reported in 102 Misc. Rep. 719.) Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

BERTHA M. BERKE, as Administratrix, etc., of EDWARD CHRISTOPHER BERKE, Deceased, Respondent, v. STATEN ISLAND MIDLAND RAILWAY COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ.

CARRIE T. BROWN and Others, Respondents, v. THOMAS H. MILLSPAUGH, Individually and as Executor, etc., of HENRY C. HIGGINSON, Deceased, Appellant.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

JOSEPH P. CARNEY, Appellant, v. PENN REALTY COMPANY, Respondent.—Appellant having irregularly submitted his papers after the June term, the court will hear him with defendant's counsel on December 14, 1917, at ten A. M.

ANNA CHROSCIEL, as Administratrix, etc., of JOHN CHROSCIEL, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

CHARLES P. DELACEY, an Infant, by JOHN J. DELACEY, His Guardian ad Litem, Respondent, v. THE J. M. HORTON ICE CREAM COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

HERBERT DURYEA, JR., an Infant, by HERBERT DURYEA, SR., His Guardian ad Litem, Respondent, v. MURRAY HILL GARAGE COMPANY, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, on the ground that the verdict is contrary to the weight of the evidence. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

SOLOMON EHRENWORTH, Respondent, v. GEORGE F. STUHMER & COMPANY, INC., Appellant.—Plaintiff's evidence tended to show that the parties

orally agreed that defendant would sell to plaintiff such amount of black bread or pumpernickel as plaintiff needed for his trade, at one cent a loaf below wholesale price and two cents below retail price, so long as they both should be in business; that plaintiff would sell no other black bread than defendant's, and that defendant should sell to no one other than plaintiff in East New York and Brownsville; that the parties so dealt to their mutual satisfaction for about eight years, during which time plaintiff built up a large trade in defendant's bread, when defendant broke its promise by advertising and selling direct in the stipulated territory. We think that the contract lacked mutuality, and so consideration, and that defendant's promise was a nude pact. The contract as to amount, as to time of duration and as to price, although not certain, could be reduced to certainty, — the amount by reference to plaintiff's needs in his business, the duration by the time that both plaintiff and defendant continued in business, and the price by reference to the prevalent wholesale and retail price; but plaintiff did not bind himself to purchase any definite amount, or any amount whatever, nor to continue in business for any definite length of time or for any time whatever. There, therefore, rested on the plaintiff no obligation which supported the undertaking of defendant. The real substance of the engagement was an executory contract of sale. There was no element of agency or employment in it, and plaintiff's agreement to sell no other black bread than defendant's, and defendant's agreement to sell to no one else, are merely incidental to the contract of sale, and cannot suffice to give vitality to such an agreement which lacks an essential element of a valid contract. Judgment and order reversed, with costs to the appellant, and complaint dismissed. *Jenks, P. J., Thomas, Mills and Blackmar, JJ., concurred; Putnam, J., voted to affirm on the ground that from the condition that plaintiff should sell no other pumpernickel bread than Stuhmer's a jury might find that this restriction really amounted to an agreement to take Stuhmer's pumpernickel. In Wells v. Alexandre (130 N. Y. 642) the court speaks of a readiness to infer things needful to supplement express terms if "any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other."*

MARCUS G. GOLDSTEIN, Trading as NEW YORK CHEMICAL COMPANY, Appellant, v. MARX & RAWOLLE, Respondent.— Delivery and acceptance of the drum of glycerine taken by plaintiff on September fifteenth, and paid for as billed at the modified rate of twenty-two cents per pound, might be a compliance with the New York Sales Act, section 85,\* as an acceptance of part of the goods contracted to be sold. Whether this was so intended would be for the jury. The complaint, therefore, should not have been dismissed on the ground that after June thirtieth there was no note or memorandum to satisfy the Statute of Frauds.\* Although in the clash of opposing motions at the close of plaintiff's case plaintiff did not expressly ask to go to the jury on any issue, we think the interests of justice require

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\* See Pers. Prop. Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45), § 85, as added by Laws of 1911, chap. 571.— [RE.]

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a new trial. Judgment reversed and new trial granted, costs to abide the event. Stapleton, Mills, Rich, Putnam and Blackmar, JJ., concurred.

JOHANNA HAGUE, Appellant, v. CHARLES B. SHANKS, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

JAMES HAGUE, Appellant, v. CHARLES B. SHANKS, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ARTHUR P. HEINZE, as Administrator, etc., Appellant, v. WALTER A. FULLERTON, as Administrator, etc., Respondent.— Interlocutory judgment affirmed, with costs, and final judgment ordered for defendant, with costs. No opinion. Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ., concurred.

EUGENE HORTON, Respondent, v. THE HAYES COMPANY and Others, Appellants, Impleaded with Another. (Appeal No. 1.) — Order reversed so far as it restrains defendants voting upon the stock of the Hayes Company, from voting as directors of the Hayes Company, or from voting the stock held by the Hayes Company in the Howell-Hinchman Company, but such voting may not be done in furtherance of any act otherwise forbidden in the order. Defendants enjoined from entering into any engagement in any way enlarging in time or amount any salaries or compensation to any officer or director of the Howell-Hinchman Company, or from doing any act in the management of the Howell-Hinchman Company that is not in the course of the usual business of that company. Order as so modified affirmed, without costs. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred. Order to be settled before Mr. Justice Thomas.

EUGENE HORTON, Respondent, v. THE HAYES COMPANY and Others, Appellants, Impleaded with Another. (Appeal No. 2.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

In the Matter of the Application of THE CITY OF NEW YORK, Appellant, Relative to Acquiring Title, etc., for the Opening and Extending of Fifty-fifth Street, from Sixteenth Avenue to Nineteenth Avenue, etc. Estate of ALFRED ELLERN, Appellant; OTTO THURNAUER, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion to confirm assessment granted, with ten dollars costs, upon the ground that the advantages obtained by benefit parcel 173 justified the assessment of it, in that the opening of Fifty-fourth street makes parcel 173 a corner lot, with increased area for development and with opportunity for development of an interior lot on Fifty-fourth street where none existed, besides another interior lot on Eighteenth avenue. The record reveals no error in the assessment of the Ellern parcel. Thomas, Mills and Rich, JJ., concurred; Jenks, P. J., and Stapleton, J., voted to affirm on the opinion of Mr. Justice Cropsey at Special Term (98 Misc. Rep. 156).

In the Matter of the Petition of HYMAN SONN and HENRY SONN, Appellants, to Compel MARY E. CASTELLANO, Respondent, to Render and Have Judicially Settled Her Account as Administratrix de Bonis Non of PHILIP

MONAGHAN, Deceased.—Order of the Surrogate's Court of Kings county affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

HERMAN A. KLATT, Respondent, v. EMILIE KLATT, Appellant.—Judgment affirmed, without costs, upon the ground that the evidence of unwifely conduct on defendant's part, outside of direct proof of adultery charged in the complaint, was in our judgment competent upon the trial of the cause of action for separation, notwithstanding the verdict in defendant's favor upon the trial of the framed issues of adultery under the cause of action for divorce, and upon the further ground that at folio 353 of the record the defendant in court, by her counsel, admitted, in effect, that all the evidence against her, except that as to the actual commission of adultery, was true. We, however, reverse the finding of fact that plaintiff did not have sexual intercourse with the defendant after November, 1915, and that he was not the father of the child born to defendant on October 26, 1916, and also the conclusion of law to the same effect, because we consider that the verdict of the jury was conclusive in her favor upon those issues or questions. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred. Order to be settled before Mr. Justice Mills.

VALENTINO MARCELLO, Respondent, v. CHARLES DELOCA and Others, Appellants.—In the 10th finding of fact the "Two hundred ninety-three (\$293) dollars" balance found due and owing the plaintiff from the appellant, is stricken out, and "Two hundred and fifty-three and 02/100 (\$253.02) dollars" inserted in lieu thereof, to conform such balance to the findings of the total indebtedness of \$1,644.75 due the plaintiff from the appellant Deloca, and the credit of \$1,391.73 to which Deloca was entitled in reduction thereof; the 1st, 2d and 3d conclusions of law and the judgment are each modified accordingly; and as so modified the judgment of the County Court of Queens county is affirmed, without costs to either party in this court. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

LEWIS E. MCCONNELL, Respondent, v. JAMES BINKOV and ISAAC BOTTER, Appellants.—Order reversed, with ten dollars costs and disbursements, and motion granted. We are unable to perceive in what respect the moving papers are deficient. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

WLADISLAW MODZELEWSKI, as Administrator, etc., Respondent, v. S. LIEBMANN'S SONS BREWING COMPANY, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, for error at folio 274 of the record. In the charge made upon request, the degree of care is not stated, and by the charge the issue of contributory negligence is improperly eliminated from the case. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

SARAH A. MOORE and Others, Appellants, v. GEORGE M. HENDERSON, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

HUGO PANZER, Respondent, v. THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant.—Judgment unanimously affirmed, with

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costs. No opinion. Present — Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ.

MARIA PASSETTI, Appellant, v. CHARLES B. SHANKS, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

ALEXANDER PERLMAN, Appellant, v. BELLE PERLMAN, Respondent.— Judgment affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

LEONARD PORTER, Appellant, v. WALDO G. FAY, Respondent.— Order, as resettled, modified so as to provide that the plaintiff may not be examined as to the nature of the contract between the parties; and as so modified affirmed, without costs. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred. Order to be settled before Mr. Justice Mills.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MOSES T. BARKER and STEPHEN G. LOCHARY, Appellants.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LALANCE & GROSJEAN MANUFACTURING COMPANY, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEOPOLD LAURITANO, Appellant.— Judgment of conviction of the County Court of Kings county affirmed. No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EDGAR WIGREN, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD C. MOORE, JR., Appellant, v. ROBERT H. NEVILLE and Others, Assessors, Constituting the Board of Assessors of the City of Yonkers, Respondents. Taxes of 1916.— Order reversed, without costs. Findings modified, and as so modified affirmed, and judgment directed accordingly, with costs of the proceedings, but not of this appeal, upon authority of *People ex rel. Moore v. Neville* (180 App. Div. 904), decided October 5, 1917, which decision affords the basis for the disposition of this case. Jenks, P. J., Stapleton and Mills, JJ., concurred; Blackmar, J., dissented; Putnam, J., not voting. Order to be settled before the presiding justice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH R. WILSON, Appellant, v. WILLIAM McADOO, as Chief City Magistrate, and Others, Constituting the Board of City Magistrates of the City of New York, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

WALTER E. TRENT, Respondent, v. NELSON H. TRUETT, Appellant, and THOMAS F. BONNEAU, Defendant.— Order affirmed, with ten dollars

costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Putnam and Blackmar, JJ., concurred.

HEINRICH UFFMANN, Appellant, v. WILLIAM MEYLE, Respondent.— Order setting aside verdict and granting new trial affirmed, with costs. Under the pleadings plaintiff was bound by the lease which he had executed and retained. When he received from defendant the written notice to terminate the tenancy, but nevertheless allowed the six months to run out without removing the buildings, plaintiff elected to abandon them to the lessor. Although the order dispossessing plaintiff was afterwards reversed (*Meyle v. Uffmann*, 173 App. Div. 945), the relation of landlord and tenant was not thereby reinstated. (*Niles v. Iroquois Realty Co.*, 57 Misc. Rep. 443.) The damages for being put out under a void warrant would ordinarily be for excessive force or any violence in the constable's act of dispossession, or injury to the removed chattels; but plaintiff admitted he had suffered no such damages. Plaintiff's goods, other than the buildings, were subject to his right of removal, within a reasonable time, after this termination of the tenancy. It might, therefore, be a question for the jury whether the constable's remark that he would lock up plaintiff if he went back amounted to a refusal of such right to return and remove the chattels remaining on the demised property, in which case it would be within the jury's power to find the value of such chattels, as for a conversion. (*Lewis v. Ocean N. & P. Co.*, 125 N. Y. 341, 352.) Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ., concurred.

ALISE PITCHER VOSBURGH, Respondent, v. EDGAR G. VOSBURGH, Appellant.— Judgment affirmed, with costs. No opinion. Stapleton, Mills, Rich, Putnam and Blackmar, JJ., concurred.

THE WEBSTER MANUFACTURING COMPANY, Appellant, v. RICHMOND LIGHT AND RAILROAD COMPANY, Respondent.— Judgment and order reversed and new trial granted, costs to abide the event, upon the grounds (a) that it was error to the substantial prejudice of the plaintiff to grant defendant's request to charge that "plaintiff cannot recover unless it proves the exact contract alleged," because such contract was admitted by the pleadings and did not require otherwise to be proven; and (b) that the general tenor of the charge was erroneous to plaintiff's prejudice in holding, in effect, that as to the alleged implied warranty the burden of proof rested on the plaintiff. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

ETHEL L. WILLIAMS, as Administratrix, etc., of EMMETT A. WILLIAMS, Deceased, Respondent, v. ARTHUR N. BAUMAN, Appellant.— Order modified so as to limit the examination to the matters set forth in folios 30 and 31 of the affidavit of the plaintiff, except this requirement, "just what caused said teeth to become infected;" and as so modified affirmed, without costs. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of CHARLES S. BELSFELING for Admission to the Bar.— Application granted. Present—Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

In the Matter of the Application of ROBERT H. WILSON, an Attorney.—

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Report of the Honorable George C. Holt, referee, confirmed. Present — Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ.

MARY NICHOLSON, as Administratrix, etc., of JOHN NICHOLSON, Deceased, Respondent, v. GREELEY SQUARE HOTEL COMPANY, Appellant.— Motion for resettlement of order denied, without costs. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

THEODORE BAKER and Others, Appellants, v. EMMA H. GRIFFITH and Another, Respondents.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

WILLIAM BEDELL, Respondent, v. JAMES MCARDLE, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Stapleton, Mills, Rich and Putnam, JJ., concurred; Jenks, P. J., not voting.

JAMES BOYLE, Respondent, v. FLORENCE M. WALLACE, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

RAFFAELE CASONE & COMPANY, Appellant, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Respondent.— We think that, in the exercise of the discretion conferred upon us, the order should be reversed. Order reversed, without costs, and motion granted, on payment by plaintiff, within ten days, of a trial fee of thirty dollars and ten dollars costs of the motion; otherwise, affirmed, with ten dollars costs and disbursements. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

ROSE COOPER, Respondent, v. TERRY & TENCH COMPANY, INC., Appellant, and Another, Defendant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

WILLIAM J. DAVIS, Appellant, v. VILLAGE OF MILLBROOK, Respondent.— Judgment and order of the County Court of Dutchess county unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ.

FRANCIS H. GREANEY, Respondent, v. THE TROY WAGON WORKS COMPANY, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the verdict to the sum of \$7,352.08, in which event the judgment, as so modified, and the order are unanimously affirmed, without costs, upon the ground that at all events the amount paid to Graham upon the sales to the French Commission should have been deducted from the amount of those sales in computing plaintiff's commission. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

GEORGE B. HALL, Respondent, v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

CHARLES W. HARRIS, Respondent, v. INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.— Order reversed, without costs, and verdict unanimously reinstated, on authority of *Harris v. Interborough Rapid Transit*



*Co.* (180 App. Div. 563), decided herewith. Present—Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

The following special rule, bearing date December 13, 1917, was handed down December 14, 1917, to take effect immediately:

Engagement by the permanent and associate members of the Legal Advisory Board, of the City of New York and the members of the several local boards and the government appeal agents in the work of assisting in the preparation of the Questionnaire and classification under the Selective Service Law and Regulations adopted thereunder, is regarded as necessary public service.

Actual engagement by counsel in said work shall be accepted as a legal and sufficient excuse for adjournment of cases in all courts within the Second Department until the said Legal Advisory Board shall certify to this court that the work of such boards under said law is completed.

Proof by affidavit of such engagement shall be presented when possible, to the clerk prior to the appearance of the case on the day calendar.

This rule is applicable to the Supreme Court, and also will be applied by this court in appeals involving this question.

In the Matter of the Estate of WILLIAM MILLS, 3RD, Otherwise Known as WILLIAM CROSSMAN LEE, an Infant, and His Estate. ARNOLD O. SCHRAMM, Appellant; DR WITT H. LYON, as General Guardian, etc., Respondent.—Order of the Surrogate's Court of Westchester county modified by striking therefrom the requirement that a bill of particulars be furnished setting forth the facts asked in subdivisions (a), (d), (e), (f), (g), (h) and (l), referred to in the order; and as so modified affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Proceeding to Recover Possession of Real Estate, and for the Removal Therefrom of CARL SCHMIT, SMITH or SMITT, Respondent. FRANK SCHWARZE, Appellant.—Final order of the County Court of Dutchess county affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of RUDOLF TOMFORD, Appellant, to Compel the Substitution of LOUIS COHEN in the Place and Stead of EDWARD J. McCROSSIN, Respondent, as Attorney for the Plaintiff in the Action Entitled as Follows: "Supreme Court—Kings County. RUDOLF TOMFORD, Plaintiff, against HENRY H. DIETCH, Defendant." EDWARD J. McCROSSIN, Respondent.—Order modified by striking therefrom the second directory provision, and as so modified affirmed, with ten dollars costs and disbursements to appellant, unless within ten days respondent stipulate that the order be modified by striking out from the second directory provision the words "at fifteen per cent. of any sum which may be recovered herein by suit, settlement or otherwise," and inserting the words "one hundred dollars." In case such stipulation is filed, the order as modified is affirmed, without costs. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

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LOUIS KIRBY and ANNA KIRBY, Respondents, v. FRANK SCUTT, Appellant.— Judgment and order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

WILLIAM J. LOGAN, Respondent, v. THE NEW YORK SUGAR REFINING COMPANY, Appellant.— Order affirmed by default, with ten dollars costs and disbursements. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

MARGARET MOORE, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

HENRY POULSEN, Appellant, v. W. H. GAHAGAN, INC., Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

JESSIE A. PURICK, as Administratrix, etc., Plaintiff, v. PORT JEFFERSON ELECTRIC LIGHT COMPANY, Defendant. HARRY LEE, Receiver, Respondent; BISHOP & LOFER, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SILBERMAN DAIRY COMPANY, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARY CALLAHAN, Respondent, v. ALFRED P. RUSSELL, as County Treasurer, etc., and HERBERT S. Sisson, as State Commissioner of Excise, etc., Appellants.— Order affirmed, without costs, on authority of *People ex rel. Glick v. Russell* (ante, p. 322), decided herewith. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES W. MIERS, Relator, v. ARTHUR WOODS, as Police Commissioner of the City of New York, Respondent.— Determination confirmed, with fifty dollars costs and disbursements, and writ dismissed. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HALL NORMINGTON, Respondent, v. ALFRED P. RUSSELL, as County Treasurer, etc., and HERBERT S. Sisson, as State Commissioner of Excise, etc., Appellants.— Order affirmed, without costs, on authority of *People ex rel. Glick v. Russell* (ante, p. 322), decided herewith. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM PRICE, Appellant, v. POLICE DEPARTMENT OF THE CITY OF NEW YORK, Respondent.— Order affirmed. No opinion. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARTIN SORO, Respondent, v. ALFRED P. RUSSELL, as County Treasurer, etc., and HERBERT S. Sisson, as State Commissioner of Excise, etc., Appellants.— Order affirmed, without costs, on authority of *People ex rel. Glick v. Russell* (ante, p. 322),

decided herewith. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

CONCETTO RIZZA, as Administrator, etc., of SALVATRICE RIZZA, Deceased, Respondent, v. THE R. F. STEVENS COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

DAVID SANDLER, Respondent, v. LOUIS SCHACHTER, Doing Business under the Name of WILLOUGHBY KNITTING MILLS, Appellant. — Order affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

DAVID SANDLER, Respondent, v. LOUIS SCHACHTER, Doing Business under the Name of WILLOUGHBY KNITTING MILLS, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

ALFRED SEELENFREUND, Appellant, v. OLGA SEELENFREUND, Respondent. — Although plaintiff in his brief submitted, asked this court to make disposition of the children, we decline to entertain jurisdiction based only upon such consent. The law makes provision for awarding the children to one parent or the other where there is a controversy like the present, and it is better to follow the usual remedies rather than to reach the result in the manner proposed in this action. Therefore, without expressing views as to the disposition of the children, the judgment in so far as appealed from is reversed, without costs. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

HAROLD M. TURNER and CHARLES H. YOUNG, as Executors and Trustees, etc., of THOMAS M. TURNER, Deceased, Appellants, v. TURNER REALTY ASSOCIATES OF SUFFOLK COUNTY and Another, Respondents.— Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Mills, and Rich, JJ., concurred.

SOPHIE VAN PRAAG, Appellant, v. THE CITY OF NEW YORK and ALBERT CHESEBROUGH, Respondents.— Judgment dismissing the complaint as against the defendant Chesebrough unanimously affirmed, with costs to that defendant. Judgment dismissing the complaint as against the city of New York reversed, and a new trial granted as to that defendant, costs to abide the event. The height and nature of the obstruction raised a question for the jury. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

F. MAX HUBER, Plaintiff, v. LOUIS D'ESTERRE and Others, Appellants. LOGAN TRUST COMPANY OF PHILADELPHIA and HERBERT P. QUEAL, Respondents.— Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

In the Matter of the Application of the CITY OF NEW YORK, Relative to Opening Schenectady Avenue, etc. JENNIE L. DERBY, Petitioner; COLUMBIA WIRE COMPANY, Respondent.— Motion to open default of the Columbia Wire Company granted, on payment of ten dollars costs within five days to attorney for petitioner, and on the further condition that said appellant perfect its appeal, and place the case on the calendar for the

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January term, 1918, and be ready for argument when reached; otherwise, appeal dismissed, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

MARGARET M. KOSTER, as Executrix, etc., of HENRY R. KOSTER, Deceased, Respondent, v. WESTCHESTER COUNTY BREWING COMPANY, Appellant. — Motion denied, with ten dollars costs. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

CELIA LYON, Appellant, v. THOMAS GILLERAN and Another, Respondents. — Decision of this motion held to await the argument of the appeal from the judgment. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

JOHN MCCARTHY, Appellant, v. JOHN P. STETSON, Respondent. — Motion denied upon condition that appellant perfect the appeal, place the case on the calendar for the January term, 1918, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

EDWARD WERNER, Respondent, v. GEORGE T. KELLY, Appellant. — Motion denied upon condition that appellant perfect the appeal, place the case on the calendar for the January term, 1918, and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

HARVEY A. WILLIS, Appellant, v. ELSIE H. BIRD and ELIJAH W. HOLT, as Executors, etc., of WILLIAM N. D. BIRD, Deceased, Respondents. — Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

AMERICAN DISTRICT STEAM COMPANY, Respondent, v. EVERETT E. WHEELER, Individually and as Administrator of WILLIAM T. WHEELER, Deceased, Appellant. — Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the form of the indorsement, together with the correspondence in evidence, constituted some substantial evidence that the plaintiff accepted the notes in suit with the understanding that the defendant had indorsed them so as to bind the estate, and not himself individually, and that, therefore, the trial justice should have submitted that question to the jury and not have directed a verdict for the plaintiff. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

ROBERT F. BURNS, Respondent, v. HARRY R. WILKINSON, Appellant. — Judgment and order reversed and complaint unanimously dismissed, with costs, upon the ground that as a matter of law the defendant had probable cause to believe that the plaintiff was about to take away his car without permission. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

HENRY D'HONT, an Infant, by CAMILLE D'HONT, His Guardian ad Litem, Respondent, v. THE NATIONAL SUGAR REFINING COMPANY OF NEW JERSEY, Appellant. — Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MARY A. FINN, as Administratrix, etc., of THOMAS H. FINN, Deceased, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

THOMAS GILLERAN, Respondent, v. SPRINGFIELD, L. I., CEMETERY SOCIETY, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, on authority of *Dwyer v. Slattery* (118 App. Div. 345), and it is ordered that a direction be inserted in the order that the plaintiff may show his want of knowledge of any of the particulars directed to be given. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

BERNARD F. GUINAN, Appellant, v. THOMAS D. WATERBURY, Respondent.— Judgment unanimously affirmed, with costs, on authority of *Hurlburt v. Gillett* (96 Misc. Rep. 585; *affd.* by this court, 176 App. Div. 893). Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

HOWARD D. HAMMOND, Appellant, v. ARTHUR DOUGLAS CONSTANT and SIDNEY S. HAMMOND, Respondents.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

LOUETTA HERNLY, Appellant, v. CHARLES J. HERNLY, Respondent.— Interlocutory judgment affirmed, without costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

MARGARET C. ILLINGWORTH, Appellant, v. GEORGE ILLINGWORTH, as Administrator, etc., Respondent.— Order affirmed, with ten dollars costs and disbursements, and the time of the plaintiff to plead anew extended twenty days from the date of entry of this order, so that the plaintiff, if so advised may plead an assignment. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of JOHN F. BOLES, Respondent, for a Writ of Certiorari, Commanding HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, and Another, Appellants, etc.— Order affirmed, with ten dollars costs and disbursements, on authority of *Matter of Gagnat v. Sisson* (*ante*, p. 193), decided herewith. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of THE CITY OF NEW YORK, Relative to Acquiring Title, etc., for the Opening and Extending of Lawrence Avenue, etc.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

In the Matter of the Petition of EDWARD J. FLANAGAN, to Prove the Last Will and Testament of ELLEN SINGER, Late of the County of Kings, Deceased.— Taking into consideration the extravagant and foolish provisions of the will, which wasted substantially the whole estate, the greater part of which came to testatrix as a gift from her husband, in obsequies, burial plots and monuments, leaving an aged husband, with slender means of support, and her daughter, unprovided for; the hallucinations of testatrix; the delusions continuing through a period of years that her husband and daughter were trying to poison her; acts and sayings of testatrix detailed in the evidence which seem irrational, and the absence of evidence supporting the statement in the will that her husband and daughter were inconsiderate

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of her, and cruel to her, we think that the evidence establishes a lack of testamentary capacity. Decree of the Surrogate's Court of Kings county reversed, and probate of the paper propounded denied, with costs to the appellant payable out of the estate. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred. Order to be settled with findings, within ten days, before Mr. Justice Blackmar.

In the Matter of the Probate of the Last Will and Testament of **PHOEBE J. McCLOSKEY**, Deceased. **HOWARD BUCKLEY** and Another, Appellants; **ANNIE LOUISE KNAPP**, as Administratrix, etc., Respondent.— Order of the Surrogate's Court of Westchester county reversed, with ten dollars costs and disbursements, and motion to vacate the executions denied, with ten dollars costs, upon the ground that the respondent had no right to demand from the appellants a receipt in full for the payment of their distributive shares under the decree. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of **PATRICK MURPHY**, Respondent, for a Writ of Certiorari Commanding **HERBERT S. Sisson**, as State Commissioner of Excise of the State of New York, and Another, Appellants, etc.— Order affirmed, with ten dollars costs and disbursements, on authority of *Matter of Gaignat v. Sisson* (ante, p. 193), decided herewith. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Petition of the **NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY**, etc., Respondent, under Section 62 (Now Section 91) of the Railroad Law, as to the Elimination of Grade Crossings in the Village of White Plains. **CITY OF WHITE PLAINS**, Appellant; **THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, SECOND DISTRICT**, Respondent.— Order of the Public Service Commission affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

**GUSTAVE H. KUNTZSCH**, Respondent, v. **HULDA WEDEN KUNTZSCH**, Appellant.— Judgment and order reversed and complaint dismissed, with costs to the appellant, upon the ground that there is no satisfactory evidence of such cruel and inhuman treatment of the plaintiff by defendant as to make it unsafe or improper for him to live and cohabit with her. Jenks, P. J., Stapleton, Rich, Putnam and Blackmar, JJ., concurred.

**MERRY REALTY COMPANY, INC.**, Appellant, v. **HARRY B. MARTIN** and Others, Defendants. **SEAMOKIN & HOLLIS REAL ESTATE COMPANY**, Respondent.— Orders reversed, with ten dollars costs and disbursements, and motions denied, with ten dollars costs, upon the ground that no special reason appears why this action for the foreclosure of a mortgage should not be tried in the usual way, that is, entirely by the court at Special Term. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

**THOMAS P. MOFFAT**, Appellant, v. **HUGH S. JARVIS** and **WILLIAM J. PATTERSON**, as Executors, etc., of **SAMUEL MILLER JARVIS**, Deceased, Respondents.— Order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

**THE PEOPLE OF THE STATE OF NEW YORK**, Respondent, v. **DAVID KLAFF**

HOLZ, Appellant. Judgment of conviction of the Court of Special Sessions reversed, and defendant discharged, on the ground that there is no evidence that he entered the vestibule of the building with intent to commit a crime. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK BURNS, Respondent, v. ALFRED P. RUSSELL, County Treasurer of Dutchess County, and HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY N. MERRITT, Respondent, v. HENRY P. TUTHILL, as County Treasurer of the County of Suffolk, and HERBERT S. SISSON, as State Commissioner of Excise of the State of New York, Appellants.—Order of the County Court of Suffolk county affirmed, with ten dollars costs and disbursements, on authority of *Matter of Gaignat v. Sisson* (ante, p. 193), decided herewith. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

VINCENZA RICCIO, Respondent, v. THE NASSAU ELECTRIC RAILROAD COMPANY, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Thomas, Stapleton, Mills, Rich and Blackmar, JJ.

GERTRUDE M. ROWE, Appellant, v. GEORGE W. SNYDER, Defendant, and PENNSYLVANIA RAILROAD COMPANY, Respondent.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

ELI UGOVITCH and HESTER J. YOUNG, Respondents, v. OHIO FARMERS' INSURANCE COMPANY OF LEROY, OHIO, Defendant. CHARLES E. EICKHOFF and Another, Appellants.—Orders affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

ANNA VOLLKOMMER, Respondent, v. THE CITY OF NEW YORK, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

CHARLES J. WARD, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce the verdict to the sum of \$4,000; in which event the judgment, as so modified, and the order are unanimously affirmed, without costs. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

MAUDE B. WHITING, Appellant, v. ALVIN CONSTRUCTION COMPANY and Others, Defendants, and ROSE PINOVER, Respondent.—Orders of the County Court of Kings county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

HARRY WILLNER, an Infant, by CHARLES WILLNER, His Guardian ad Litem, Respondent, v. WALDEMAR JANSEN, Appellant.—We think that on this record the verdict is contrary to the evidence; the only basis for an inference of defendant's negligence is the story that plaintiff was carried

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from 100 feet to half a block, hanging unconscious on the bumper of defendant's automobile, without the knowledge of defendant; improbable in itself, and utterly inconsistent with the reasonable and natural account of the occurrence given by defendant's witnesses, two at least of whom were disinterested. We cannot approve methods of cross-examination, examples of which are to be found at folios 210, 225 and 270 of the record, nor can or should we exclude such matters from consideration when exercising our discretionary power to order a new trial in the interests of justice. Judgment and order reversed on the law and facts, and a new trial granted, costs to abide the event. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

YETTE ZESSLER, an Infant, etc., by MAX ZESSLER, Her Guardian ad Litem, Appellant, v. CHARLES HENTSCHEL, Doing Business under the Firm Name and Style of HENTSCHEL BROTHERS, Respondent.— Judgment and order reversed and new trial granted, costs to abide the event, on the ground that the damages are inadequate. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of EDWIN W. FISKE for a Peremptory Writ of Mandamus.—Motions for stays denied, without costs. Rich, Putnam and Blackmar, JJ., concurred; Jenks, P. J., and Stapleton, J., dissented upon the ground that the record fails to show that there are before the board of canvassers the data prescribed by statute\* that enable it to act upon the vote of the sailors, soldiers and marines in the third election district of the third ward.

HENRY BIRD, Plaintiff, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendant.—Motion for leave to appeal to the Court of Appeals denied. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

GUSSIE BROWN, Appellant, v. JENNIE PRESS and ANNIE ESCHAN, Respondents.—Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the damages are inadequate. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

ANNIE DAVIDSON, as Administratrix, etc., of JOHN DAVIDSON, Deceased, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.—Judgment reversed and new trial granted, costs to abide the event, on the ground that the plaintiff has failed to establish the cause of action alleged in the complaint, and that the proof failed to establish any such defect in the condition of the pavement at the place of the accident as to charge the defendant with negligence. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

SARAH M. DE BEVOISE and Others, Respondents, v. MAPLE AVENUE CONSTRUCTION COMPANY, INC., and Others, Defendants, Impleaded with ABRAHAM WEINSTOCK and LOUIS FISHMAN, Appellants.—Judgment affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Putnam and Blackmar, JJ., concurred; Rich, J., dissented.

\* See Election Law (Consol. Laws, chap. 17; Laws of 1909, chap. 22), § 514, as amd. by Laws of 1917, chap. 815.—[RE.]



CATHERINE DOLAN, Respondent, v. SAM ELLIS and THE CITY OF WHITE PLAINS, Appellants.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

JOHN DOOLEY, Appellant and Respondent, v. EDWARD A. SEAMAN, as Executor, etc., of PATRICK MAHONEY, Deceased, Respondent and Appellant. — Judgment and orders affirmed, with costs to the plaintiff, payable out of the estate. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

CATHERINE DUCKETT, Respondent, v. ALICIA E. HARRISON and Others, Appellants.— Judgment and order unanimously affirmed, with costs, on authority of *Peters v. Kelly* (129 App. Div. 290). Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MARGARET ELLWITZ, Respondent, v. THE CITY OF NEW YORK, Appellant. — Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

WILLIAM H. FAY, Respondent, v. THE CITY OF YONKERS, Appellant.— Order of the County Court of Westchester county unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ.

HENRY FISH, Respondent, v. JACOB ROSENBERG and Another, Appellants. — Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ.

HENRY G. K. HEATH, Appellant, v. ARLAND W. JOHNSON, Respondent.— Order of the County Court of Westchester county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

In the Matter of the Application of the CITY OF NEW YORK, Respondent, Relative to Acquiring Title, etc., for the Opening and Extending of the Public Playground, etc., Borough of Brooklyn, City of New York. NEW YORK CONSOLIDATED RAILROAD COMPANY and Another, Appellants. — Order in so far as appealed from reversed, without costs, on authority of *Matter of City of New York, Juniper Avenue* (177 App. Div. 934), and report returned to the commissioners, with instructions to strike out the assessments for benefits levied upon parcels 6,000, 6,030, 6,038, 6,892 and 6,893, and to readjust the assessments accordingly. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

In the Matter of the Probate of a Paper Writing Purporting to Be the Last Will and Testament of GEORGE W. HORTON, Deceased. ALICE M. HORTON, Appellant; JANE ANN DICKIE, Executrix, etc., Respondent.— Decree of the Surrogate's Court of Westchester county affirmed, with costs to the proponent payable out of the estate. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of the Application of the PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK, etc., Relative to Acquiring Certain Lots, etc., at the Foot of Montague street, in the Borough of Brooklyn, City of New York, Required for the Purposes of the Con-

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struction, Maintenance and Operation of a Rapid Transit Railroad Known as the Whitehall Street-East River-Montague Street Route. NEW YORK DOCK COMPANY, Appellant; THE CITY OF NEW YORK and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

In the Matter of the Probate of the Last Will and Testament of HELENE RENDSBURG, Deceased. WOLF E. RENDSBURG, Appellant; BURTON C. MEIGHAN, Special Guardian for THEODORE NEPPERT and Another, Respondents.— Decree of the Surrogate's Court of Westchester county affirmed, with costs to the respondents payable out of the estate. No opinion. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of Proving the Last Will and Testament of GILBERT SOUTHARD, Deceased. JAMES H. RUSSELL and LULU V. SCOFIELD, as Executors, etc., Appellants; AUGUSTA PASCAL, Respondent.— Decree of the Surrogate's Court of Dutchess county reversed, without costs, and new trial ordered, upon the ground that there is not sufficient evidence to sustain the finding that the will was procured by undue influence on the part of James H. Russell. Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ., concurred.

In the Matter of BENJAMIN TAISHOFF and PHILIP TAISHOFF, Respondents, on an Application to Adjust the Liens of ABRAHAM B. SCHLEIMER, Respondent, and MAX SCHLEIMER, Appellant, Attorneys at Law.— Order affirmed, with ten dollars costs and disbursements. No opinion. Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred.

JOHN J. JEFFARDS, Appellant, v. JOHN CARR, Respondent.— Judgment affirmed, with costs. No opinion. Thomas, Stapleton, Rich and Putnam, JJ., concurred; Jenks, P. J., not voting.

SOPHIE JENSEN, as Administratrix, etc., of JORGEN P. JORGENSEN, Deceased, Respondent, v. JOHN D. KILLIAN, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present— Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

MOLLIE KASSEL, as Administratrix, etc., of VICTOR KASSEL, Deceased, Respondent, v. EMPIRE TINWARE COMPANY and Others, Appellants.— Interlocutory judgment affirmed, with costs. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

HORACE L. KENT, Respondent, v. GEORGE H. FRASER, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Mills, Rich and Putnam, JJ., concurred.

KURZ & UREN, INC., Appellant, v. JOHN W. PLACE and Others, Respondents.— This court finds as a fact upon the record that defendant John W. Place held the legal title to the property in question for the benefit of, and as dummy for, one J. Leo O'Brien; that the conveyance by said defendant Place to the defendant Golane Publishing Company was made at the request of said O'Brien and in discharge of a moral obligation so to convey, and that the conveyance was not made with intent to hinder, delay or defraud the creditors of said defendant Place. Judgment affirmed, without costs.

Mills, Rich and Blackmar, JJ., concurred; Thomas, J., dissented on the ground that both in law and equity Place had an indefeasible title and that the conveyance by Place to the defendant Golane Publishing Company was fraudulent as against plaintiff's creditors. If there were a judgment lien by Place's creditors, Place's discharge of a moral duty by making conveyance would not override the lien. But the creditors are entitled against an insolvent debtor to what they could subject to his judgment if a voluntary conveyance thereof had not been made. Stapleton, J., concurred with Thomas, J.

PATRICK J. LEE, Appellant, v. CRANFORD COMPANY, INC., Respondent.—Reargument ordered, and case set down for Wednesday, January 16, 1918. Present — Jenks, P. J., Thomas, Rich, Putnam and Blackmar, JJ.

DOROTHY LEWIS, Appellant, v. NEW YORK TITLE AND MORTGAGE COMPANY, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ.

WILHELM MATTFELD and MARIE MATTFELD, Respondents, v. TILLIE PRAMUK, Appellant, Impleaded with Others, Defendants.—The findings by the trial court that the bond and mortgage were for sufficient consideration, and not induced by false or fraudulent representations, are well supported by the proofs. The consideration was the conveyance of several lots which appellant has since used, leased and conveyed away, so that she cannot now restore the parties to their original position. The objection now urged, that Stephen Pramuk, the appellant's husband, was the real party in interest, not having been taken by demurrer or by answer, is not available. (*Merritt v. Walsh*, 32 N. Y. 685; Code Civ. Proc. § 499.) Judgment of foreclosure affirmed, with costs. Thomas, Stapleton, Mills, Rich and Putnam, JJ., concurred.

WILLIAM H. MILLER, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.—Judgment and orders reversed and new trial granted, costs to abide the event. Defendant was required to use a mail car, constructed in accordance with the specifications prescribed by the Postmaster-General, who was authorized by statute to prescribe. The jury were permitted to exact further requirements for guarding the skylight in the car. This was error, which ran through rulings in the admission of evidence, and also through statements in the charge. A new trial is granted because the jury were not bound to accept the defendant's only vouchsafed explanation of the cause of the break in the skylight, as it was based wholly upon circumstantial evidence, and it is not conclusively established that the skylight was properly constructed and properly maintained. Jenks, P. J., Thomas, Stapleton, Mills and Rich, JJ., concurred.

NEW YORK DOCK COMPANY, Appellant, v. FLINN-O'ROURKE COMPANY, INC., Respondent.—Order denying injunction affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ., concurred.

LILLIAN I. PURCELL, as Administratrix, etc., of JOHN A. PURCELL, Deceased, Respondent, v. FREDERICK W. VAN COTT, Appellant.—Judgment

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and order reversed and new trial granted, costs to abide the event, upon the ground that the verdict finding the decedent free from contributory negligence is contrary to the evidence. Stapleton, Rich and Blackmar, JJ., concurred; Jenks, P. J., and Thomas, J., voted to reverse the judgment and dismiss the complaint on the ground that as matter of law the decedent was guilty of negligence that contributed to his death.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JULIUS CHLEMENS, Appellant.— Judgment of conviction of the County Court of Kings county affirmed. No opinion. Stapleton, Mills, Rich, Putnam and Blackmar, JJ., concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. NATHAN COHEN, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ., concurred.

MICHAEL REGAN, Respondent, v. ELIZABETH RHIND, Appellant.— Judgment affirmed, with costs. No opinion. The sixth finding of fact, however, is modified by changing the words therein "fraudulently and surreptitiously" to the words "without the plaintiff's knowledge, consent or authority." Thomas, Stapleton, Mills, Rich and Blackmar, JJ., concurred. Order to be settled before Mr. Justice Thomas.

WILLIAM J. RIORDAN, JR., Respondent, v. BROOKLYN UNION GAS COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Mills, Putnam and Blackmar, JJ.

FRED SEYFORD, Respondent, v. SOUTHERN PACIFIC COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Thomas, Stapleton, Rich and Blackmar, JJ.

HENRY I. STETLER and Others, Taxpayers of the County of Rockland, Respondents and Appellants, v. JOHN F. MCFARLANE, Appellant and Respondent.— In a taxpayer's suit under section 51 of the General Municipal Law, to recover moneys alleged to have been illegally paid, collusion must be proven. (*Daly v. Haight*, 170 App. Div. 470; *Wallace v. Jones*, 195 N. Y. 511; *Shiebler v. Smith*, 178 App. Div. 925.) Here the court expressly refused to find that the charges were false, fictitious or fraudulent. The complaint did not charge collusion, but only that the audit and allowance of the charges were illegal. Judgment reversed and complaint dismissed, without costs. Jenks, P. J., Thomas, Stapleton, Rich and Putnam, JJ., concurred.

FREDERICK W. WETTLAUER, by FREDERICK C. WETTLAUER, His Guardian ad Litem, Respondent, v. PETER H. WOODWARD and ADELIA WOODWARD, Appellants, and Another, Defendant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Stapleton, Mills, Rich and Putnam, JJ., concurred.

WRIGHT FLYING FIELD, INC., Appellant, v. EMPIRE STATE AIRCRAFT CORPORATION, Respondent.— Motion for leave to appeal to the Court of Appeals denied, without costs. Thomas, Stapleton, Rich and Putnam, JJ., concurred; Jenks, P. J., not voting.

THE PEOPLE'S TRUST COMPANY, Appellant, v. PATRICK H. FLYNN and

Others, Defendants. HAMILTON TRUST COMPANY, Respondent, and LEANDER B. FABER, as Receiver, etc., Appellant. J. BENEDICT ROACHE, Appellant, v. PATRICK H. FLYNN and Others, Defendants. HAMILTON TRUST COMPANY, Respondent, and LEANDER B. FABER, as Receiver, etc., Appellant.—After reargument, we adhere to our original determination, except that the priority of liens is fixed as follows: The Sage judgment, the Winters judgment, the People's Trust Company judgment, and the Hamilton Trust Company judgment. The plaintiff Roache, by beginning his action as assignee of the Sage and Winters judgment, acquired a preference over other judgment creditors, and the plaintiff the People's Trust Company by beginning an action acquired a lien over judgment creditors other than the assignee of Sage and Winters. The Hamilton Trust Company began no action, and, therefore, acquired no lien, and in neither action did the Hamilton Trust Company make affirmative claim for an equitable lien. The decisions and judgments are modified accordingly, and as modified, judgments affirmed, without costs. Thomas, Stapleton, Mills, Rich and Putnam, JJ., concurred. Order to be settled upon notice before Mr. Justice Rich.

*Decisions by the Presiding Justice on Applications to Appeal from the Appellate Term.*

HARRY DEHOFF, Appellant, v. ADOLF ASPEGREN and Another, Respondents.—Application denied, with ten dollars costs.

HARRY ENGEL, Respondent, v. MUTUAL GARMENT COMPANY, Appellant.—Application denied, with ten dollars costs.

ABRAHAM GONICK, Appellant, v. SAM GOLDFARB, Respondent.—Application denied, with ten dollars costs.

MILDRED PEARLMAN, Respondent, v. YOKOHAMA SPECIE BANK, LIMITED, Appellant.—Application denied, without costs.

WILLIAM R. PETZE, Respondent, v. HORACE WATERS & COMPANY, Appellant.—Application denied, without costs.

### THIRD DEPARTMENT, DECEMBER, 1917.

#### Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of DORA BERISSO and Minor Dependents, Respondents, for Compensation under the Workmen's Compensation Law, for the Death of GEORGE G. BERISSO, against ANNIE L. EAGAN, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.

*Workmen's compensation — verbal notice of accident to employer.*

Appeal from an award of the State Industrial Commission, entered on the 6th day of July, 1917.

Award reversed and matter remitted to the Commission on the authority of *Dorb v. Stearns & Co.* (180 App. Div. 138). All concurred, except Kellogg, P. J., dissenting in memorandum, in which Lyon, J., concurred.

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KELLOGG, P. J. (dissenting): The accident was May nineteenth, the death May twenty-seventh. Verbal notice was given May twenty-eighth. Upon the blanks furnished by the Commission they asked the claimant to state, "Has notice been served on employer?" She answered, "Yes." To the question, "If so, how? (by delivery or registered mail)" she answered, "verbally." To the question, "What date?" she answered, "About May 28th, 1916." Neither party introduced any evidence upon that subject and the position of each must rest upon those answers. The notice referred to in the blanks furnished by the Commission evidently relates to notice of the facts required by law to be given. We must, therefore, conclude that the only defect in the notice of death was that it was verbal and not written. All reasonable intendment is in favor of the claim and of the service of proper notice. The Commission finds that after the injury the claimant was in no condition to give notice and that he died within the ten days, and that the employer having verbal notice of the death next day was not prejudiced. The requirement of notice is not to defeat the employee by a technicality, but is to secure to the employer an opportunity to investigate the facts and find whether it has a defense. When the employer received verbal notice, it had every advantage it could have acquired if a written notice had been given; it was enabled fully to ascertain the facts and defend itself. Upon the record it was a fair question of fact whether, the notice being verbal instead of written but being within the statutory time, the employer and carrier were prejudiced by the fact that it was not in writing. The conclusion of the Commission upon that question of fact is binding upon us. I favor an affirmance. Lyon, J., concurred.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of FREDERICK C. GORDON, JR., Respondent, for Compensation, under the Workmen's Compensation Law, against HOLBROOK, CABOT & ROLLINS, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.

*Workmen's compensation — insufficient notice.*

Appeal from an award of the State Industrial Commission, entered on the 30th day of July, 1917.

Award reversed and matter remitted to Commission on the authority of *Dorb v. Stearns & Co.* (180 App. Div. 138). All concurred, except Kellogg, P. J., dissenting in memorandum, in which Lyon, J., concurred.

KELLOGG, P. J. (dissenting): The accident was March 30, 1916. The disability did not occur until May twenty-first; up to that time the claimant did not consider his injury serious. The accident took place in the presence of the foreman and the facts of the injury were then stated to him. June third the employer wrote the insurance company the particulars of the accident and the company conceded on the hearing that it had notice of the accident June third. There is no evidence that the foreman did not tell the company of the accident at that time; it was clearly his duty to do

so, and if the company claims that he did not, it should have made proof of that fact. The Commission finds that written notice was not given within ten days of the accident, but says the company or carrier was not prejudiced because the company knew of the facts. It overlooks the fact that the notice is to be given ten days after the disability, and not after the injury, and we have seen by the admissions of the company that on June third it had full notice, and that was but thirteen days after the disability. Upon this evidence it was a fair question for the Commission to determine as a matter of fact whether the company was prejudiced by failure to give notice, and its determination upon the facts appearing in the record and found by the Commission is conclusive upon us. I favor an affirmance. Lyon, J., concurred.

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CALVIN A. LAMB, Respondent, v. S. CHENEY & SON, Appellant.

*Trespass — removing employee's goods.*

Appeal from an order entered in the Madison county clerk's office on March 29, 1917, overruling defendant's demurrer to the complaint.

Order affirmed, with ten dollars costs and disbursements, with leave to the defendant to answer within twenty days on payment of said costs and of the costs awarded by the court below. All concurred, except Kellogg, P. J., dissenting in memorandum, in which Sewell, J., concurred.

KELLOGG, P. J. (dissenting): The interlocutory judgment rests upon the theory that under *De Jong v. Behrman Co.* (148 App. Div. 37) there is no liability for inducing a servant to quit the service of the employer, but that the defendant, in moving the servant from the employer's premises, was liable for trespass. With some reluctance I am willing to follow the *De Jong* case. If the servant had a right to leave the employment, he had the right to remove his goods and family from the employer's premises, and the defendant in moving the goods for him was performing a legal act. Permitting the servant to occupy the premises carried with it a right to move his goods and family when desired. It seems, therefore, that the defendant is not liable for trespass in removing the servant's goods from the premises. Sewell, J., concurred.

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SPA BATHS COMPANY, Appellant, v. THE BOARD OF COMMISSIONERS OF THE STATE RESERVATION AT SARATOGA SPRINGS, Respondent.— Order unanimously affirmed on the opinion of Whitney, J., at Special Term, with costs. (Reported in 98 Misc. Rep. 399.)

CHARLES ACKNER, Appellant, v. EDWARD SCHRECK, Respondent.— Judgment unanimously affirmed, with costs.

THE BALLSTON REFRIGERATING STORAGE COMPANY, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.— Judgment modified by deducting therefrom the sum of \$666.67, the expense of selling the apples in the city of New York, as of the date of the judgment, and as modified unanimously affirmed, without costs.

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CLARENCE F. BAKER and Another, Respondents, v. CONRAD YAGEL, Appellant.— Judgment unanimously affirmed, with costs.

HENRY C. BALLOU, Appellant, v. THE STATE OF NEW YORK, Respondent.— Judgment unanimously affirmed, with costs.

FRANCIS E. CARTER, as Administrator, etc., of BESSIE C. CARTER, Deceased, Respondent, v. THE VILLAGE OF RIFTON, Appellant.— Judgment and order reversed on the ground that the verdict is not sustained by the evidence, and new trial granted, with costs to the appellant to abide the event. All concurred.

SAMUEL C. DUDEY, Respondent, v. THE SANTA CLARA LUMBER COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs.

GENEVA M. DENNIN, Appellant, v. JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY, Respondent.— Judgment affirmed, with costs, on the authority of *Boyle v. Bush Terminal R. R. Co.* (210 N. Y. 389) and *Knapp v. Wells, Fargo & Co.* (134 App. Div. 712). All concurred, except Woodward, J., dissenting.

JOHN M. EDDY, Respondent, v. ANNA BELL, Appellant.— Judgment and order unanimously affirmed, with costs.

THE GLASS BAKERY, Respondent, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.— Judgment unanimously affirmed, with costs.

THE HELDERBERG CEMENT COMPANY, Respondent, v. INTER-CONTINENTAL CONSTRUCTION CORPORATION, Appellant.— Judgment unanimously affirmed, with costs.

RICHARD HOPKINS, Respondent, v. THE STATE OF NEW YORK, Appellant.— Judgment affirmed, with costs. All concurred, except Cochrane, J., dissenting.

TRIPKO KRSTOVIC, Respondent, v. CHARLES H. VAN BUREN and SAMUEL W. DAY, Copartners, etc., Appellants.— Order unanimously affirmed, with ten dollars costs and disbursements.

CORNELIUS KAHLEN and ANNA KAHLEN, His Wife, Appellants, v. THE STATE OF NEW YORK, Respondent.— Judgment unanimously affirmed.

EDWARD J. MANNIX, Appellant, v. J. SHELDON FROST, as Commissioner of Public Safety of the City of Albany, New York, and Another, Respondents.— Order unanimously affirmed, with ten dollars costs and disbursements.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law of AMELIA FRIDAY, Widow, and Two Minor Children, Respondents, for the Death of WILLIAM FRIDAY, v. GALUSHA STOVE COMPANY, Employer, and THE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claims of ENI HUDEC and Others, Wife and Children Respectively of VANDLEIN HUDEC, Deceased, Respondents, for Compensation under the Workmen's Compensation Law, v. GEORGE G. WILSON COMPANY, INC., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants.



Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES DIVOTA, Respondent, for Compensation under the Workmen's Compensation Law, v. GEORGE G. WILSON COMPANY, INC., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants. Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of FRANK DEVORAK, Claimant, for Compensation under the Workmen's Compensation Law, Respondent, v. GEORGE G. WILSON COMPANY, INC., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants. Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of FRANK CHARVAT for Compensation under the Workmen's Compensation Law, Respondent, v. GEORGE G. WILSON COMPANY, INC., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants.—Award in each case unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of LENA GARLAPOW, Respondent, on Account of Claimant CHARLES GARLAPOW, Deceased, v. ZUCKMAIER BROTHERS, Employer, and the COMMERCIAL CASUALTY INSURANCE COMPANY, Insurance Carrier, Appellants.—Award and orders unanimously affirmed.

In the Matter of the Adoption of a Resolution Requiring the Payment into the State Fund of the Present Value of Death Benefits Pursuant to the Provisions of Section 27 of the Workmen's Compensation Law, as Amended by Chapter 705 of the Laws of 1917.—Question certified answered in the affirmative. All concurred, except Lyon and Sewell, JJ., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim under the Workmen's Compensation Law, Made by LENA LONDON, Respondent, for Compensation to Herself, v. CASINO WAIST COMPANY, Employer, and OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurer, Appellants.—Award unanimously affirmed.

In the Matter of the Petition of DAVID A. THOMPSON, as Executor, etc., Respondent, for the Probate of the Last Will and Testament, and Codicil Thereto, of JESSE W. POTTS, Deceased, etc. JULIA MAUD DE FOREST and Others, Appellants; ST. PETER'S CHURCH IN THE CITY OF ALBANY and Others, Respondents.—Decree and order of the Surrogate's Court unanimously affirmed, with costs.

ALICE MACCAULEY, as Administratrix, etc., of WILLIAM MACCAULEY, Deceased, Respondent, v. AMERICAN LOCOMOTIVE COMPANY, Appellant.—Judgment and orders unanimously affirmed, with costs.

In the Matter of the Application of WILLIAM HICKEY, Respondent, for a Writ of Certiorari to the Commissioner of Excise of the State of New York and the County Treasurer of the County of Columbia. HERBERT S. SISSON, as State Commissioner of Excise, and JOHN CONNOR, as County Treasurer of Columbia County, Appellants.—Order reversed, with costs, and motion denied, with ten dollars costs, on the authority of *People ex rel. Gstalter v. Sisson* (179 App. Div. 610). All concurred, except Kellogg, P. J., dissenting.

In the Matter of the Application of ALFRED SNYDER, of the Town of Kinderhook, Respondent, for a Writ of Certiorari to the Commissioner

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of Excise of the State of New York and the County Treasurer of the County of Columbia. HERBERT S. Sisson, as State Commissioner of Excise and JOHN CONNOR, as County Treasurer of Columbia County, Appellants.— Order unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION. In the Matter of the Claim of CHARLES E. SHARLOW, for Compensation under the Workmen's Compensation Law, v. SHARLOW BROTHERS COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier.— Question certified answered in the negative on the authority of *Matter of Bowne v. Bowne Co.* (221 N. Y. 28). All concurred.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of Mrs. LOTTIE COONS, Respondent, for Compensation for Herself and Children for the Death of BERNARD COONS, v. ENDICOTT-JOHNSON COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CATRINA STURCKE, Respondent, for Compensation under the Workmen's Compensation Law, v. HENRY LULLMAN, Employer, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ALPHONSE BEAUDET, Respondent, for Compensation under the Workmen's Compensation Law, v. GEORGE MERTZ'S SONS, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Award affirmed. All concurred, except Kellogg, P. J., and Cochrane, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law of WINIFRED MACK, Widow, Respondent, for the Death of JAMES MACK, v. NEW YORK DOCK COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HENRY CARLSON, Appellant, for Compensation under the Workmen's Compensation Law, v. J. EDWARD OGDEN COMPANY, INC., Employer, and STATE INSURANCE FUND, Insurance Carrier, Respondents.— Question certified answered in the affirmative on the authority of *Matter of Post v. Burger & Gohlke* (216 N. Y. 544). All concurred, except Kellogg, P. J., and Cochrane, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by ANN CLAIR CAIN, Widow, etc., v. UNITED BREEDERS COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, Insurance Carrier, Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION. In the Matter of the Claim of MICHAEL SCHULTZ, for Compensation under the Workmen's Compensation

LAW, v. METZ BROTHERS, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HELEN ZALEWSKI and Another for Compensation under the Workmen's Compensation Law for the Death of PETER JANISZEWSKI, v. ROBERT GAIR COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

In the Matter of the Judicial Settlement of the Accounts of HORACE BAILEY, as Administrator, etc., of JACOB E. JOHNSON, Deceased, Appellant. GEORGE H. INGRAM and Others, Respondents.—The decree as to the Ingram claim is reversed as excessive, unless he files stipulation reducing the recovery to \$1,200 as of the date of the decree, in which case the decree is so modified and as modified affirmed. In the claim of Elizabeth A. Crandall the court finds that there is no satisfactory evidence taking the case out of the provisions of the Statute of Limitations and her recovery must be confined to services rendered for the last six years, and fixes the value of her services for that time at \$5 per week from which should be deducted \$131.75, payments made during that time. In other respects the decree is affirmed, without costs. All concurred. The court disapproves of the finding of fact that at any time prior to six years before the decedent's death he had paid sums upon the plaintiff's account which prevented the Statute of Limitations from barring a recovery thereon, and of the finding that prior to said six years any sum was due to the said plaintiff for services of himself and wife. It also disapproves of the findings that prior to the last six years any sum had been paid to Elizabeth A. Crandall which would prevent the Statute of Limitations from applying to any claim that she might have for services, and disapproves of any finding that any sum was due to her for services rendered prior to that time; and finds as a fact that no sum was due to her for services rendered at any time prior to six years before the decedent's death.

In the Matter of the Final Account of FRANK SOMMER, as Executor, etc., of ADAM SOMMER, Deceased, Appellant. CHARLES SOMMER, Respondent.—Decree unanimously affirmed, with costs.

In the Matter of the Probate of the Last Will and Testament of FLETCHER H. MURRAY, Late of the Town of Champlain, Clinton County, New York, Deceased. ARTHUR J. MURRAY, Appellant; WALTER R. MURRAY, Respondent.—Decree unanimously affirmed, with costs to the proponent.

PARKER-HASSAM PAVING COMPANY, Appellant, v. WILLIAM G. NIXDORF and DANIEL J. CONROY, Respondents.—Judgment unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WALDO J. MORSE, JR., v. EUGENE M. TRAVIS, Comptroller of the State of New York.—Determination unanimously confirmed, with fifty dollars costs and disbursements.

CHARLES H. STARKE, Appellant, v. THE CATSKILL AND ALBANY STEAMBOAT COMPANY, LIMITED, and W. ALLISON BEAR, Respondents.—Judgment and order reversed and new trial granted, with costs to the appellant to

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abide the event, upon the ground that under the authority of *Hall v. New York Telephone Co.* (220 N. Y. 299) the trial justice erroneously charged the jury that the burden of proof was on the plaintiff to establish his freedom from contributory negligence. All concurred, except Kellogg, P. J., who dissented upon the ground that the erroneous charge could not have changed the result as no legal liability was shown.

MARION E. SEAVER, Appellant, v. MATT C. RANSOM and FRED F. FISK, as Executors, etc., Respondents.—Order unanimously affirmed, with ten dollars costs and disbursements.

CANDACE WHEELER, Respondent, v. ALBERT M. SIGOURNEY, Impleaded with MARTIN MAGER, Appellant.—Judgment unanimously affirmed, with costs.

WILLIAM A. WARREN and CHARLES A. WARREN, Individually and as Trustees, etc., Appellants, v. THE ALBANY TRUCKING AND STORAGE COMPANY, Respondent, Impleaded with Another.—Judgment unanimously affirmed, with costs.

ALICE EUGENIE WEED and Another, Respondents, v. ORVILLE WHITE and Others, Appellants.—Judgment modified by declaring that the ownership of the plaintiffs and the right of possession of the one-foot strip of land is subject to the joint right of way mentioned in the deed from Stebbins to Louprewte, and as so modified unanimously affirmed, with costs to the respondent.

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#### FOURTH DEPARTMENT, DECEMBER, 1917.

HIRAM B. PARISH, Appellant, v. JOHN J. NEIL, Respondent.

*Replevin — constructive possession — appeal.*

Appeal from a judgment and order of the Yates County Court, entered August 6, 1917, reversing a judgment of a justice of the peace in favor of the plaintiff in an action on replevin.

PER CURIAM: It does not appear that in the first replevin action plaintiff gave the required undertaking for the return of the chattel, nor does it appear that the judgment dismissing that action awarded possession or directed the return of the chattel to defendant. There is, therefore, no ground for sustaining the contention of plaintiff's counsel that defendant had constructive possession at the time the present action was begun. On this record it must be held that plaintiff had actual possession of the chattel at the time he began this action, and that it does not appear that defendant was then claiming a right to possession. The form of the notice of appeal to the County Court permitted a review of the whole judgment and did not limit the appeal to the award of costs. The judgment of the County Court should be affirmed, with costs. All concurred. Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HENRY JEFFREY, Appellant.

Appeal from a judgment of conviction of the County Court of Jefferson county, rendered December 18, 1915.

PER CURIAM: We are of the opinion that the evidence fairly shows that the defendant appropriated the property openly and avowedly under a claim of title preferred in good faith. Even if there is some evidence to the contrary, the verdict of the jury is against the weight of the evidence upon that question. All concurred, except Foote, J., who dissented and voted for affirmance. Judgment of conviction and order reversed, and new trial granted upon the law and facts.

In the Matter of the Last Will and Testament of MARY BUESCH, Deceased. EUGENE M. BARTLETT, as Special Guardian of ELEANOR BUESCH, Appellant; ST. JAMES CHURCH and Others, Respondents.

Appeal from two decrees of the Surrogate's Court of Erie county, entered December 26, 1916, and January 9, 1917, respectively.

PER CURIAM: The decrees should be affirmed, and the appeal is so lacking in merit that no costs should be allowed to the special guardian. All concurred. Decrees affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. AIKENHEAD, BAILEY & DONALDSON, INC., and Another, Appellants.— Judgment and order affirmed, with costs. All concurred.

WELLING E. MAPES and Others, as Temporary Administrators, etc., Respondents, v. EDWARD L. WALLACE, IMP., etc., Appellant. (Action No. 1.) WELLING E. MAPES and Others, as Temporary Administrators, etc., Respondents, v. EDWARD L. WALLACE, IMP. etc., Appellant. (Action No. 2.) — Upon reargument, judgment in each case affirmed, with costs. All concurred.

MOLLIE RARRICK, as Administratrix, etc., Appellant, v. WILLIAM S. McMILLAN, Respondent.— Judgment and order reversed and new trial ordered, with costs to appellant to abide event. Held, that while there was ample evidence to justify the verdict upon the ground of contributory negligence, we are unable to say with certainty that the jury based their verdict upon that ground, and as the court erred in receiving the declarations of the deceased that he was not married to the mother of the plaintiff, and his declarations concerning his association with and conduct toward other women, we think that a new trial should be granted. All concurred, except Merrell, J., who dissented and voted for affirmance.

MARY HALPINE, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, (1) that the verdict is against the

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weight of the evidence upon the question of the condition of the plaintiff's heart being due to the accident; (2) that the court erred in charging the jury that there was "no evidence that the placing of a dog or catch on the outside of the door jamb to prevent the door swinging out into the vestibule was impracticable or impossible." All concurred; Kruse, P. J., in result upon second ground stated.

ADAM NEU, Respondent, v. JOHN FLEISHMAN, Appellant.— Judgment and order affirmed, with costs. All concurred, except Lambert and Merrell, JJ., who dissented and voted for reversal and a new trial.

ABRAHAM L. YATES, Respondent, v. MITCHELL BUILDERS SUPPLY COMPANY, Appellant, and D. J. NEWSON CONTRACTING COMPANY and Others, Respondents.— Judgment modified so as to provide for the enforcement of the appellant Mitchell Builders Supply Company's lien as a first lien, and as so modified affirmed, with costs to appellant payable out of the fund. Settle order before Mr. Justice Merrell on two days' notice at which time findings to be disapproved and proposed new findings may be submitted. All concurred.

DANIEL W. PECK, Respondent, v. BATHURST LUMBER COMPANY, LTD., Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, on the authority of *Brandt v. City of New York* (99 App. Div. 260). All concurred.

In the Matter of the Probate of the Last Will and Testament of LUISE BURGER, Deceased. WILLIAM MAINE, Executor, etc., Appellant; HENRY J. MAUS and Others, Respondents.— Decree and order reversed, with costs in this court to the appellant and against the contestants, and matter remitted to the Surrogate's Court. Held, that the evidence was insufficient to sustain the verdict. All concurred.

GENEVIEVE BROOKS, Appellant, v. JOHN J. HALLOHAN and Others, Respondents.— Judgment affirmed, with costs. Held, that the building in which the accident happened was not a tenement house within the meaning of subdivision 1 of section 2 of the Tenement House Law.\* All concurred.

ALFRED FRANK, Appellant, v. B. FRANKLIN NEWCOMB, Individually and as Executor, etc., Respondent.— Judgment affirmed, with costs. All concurred.

ARCHIE E. WHITE, Respondent, v. JOHN L. SHULTZ and Another, Appellants.— Judgment and order affirmed, with costs. All concurred.

CHARLES M. GIBBS, Respondent, v. WILL C. YOUNG, Appellant.— Judgment and order affirmed, with costs. All concurred.

LEVI ELSON, Respondent, v. JOHN D. CRIMMINS, Appellant.— Judgment affirmed, with costs. All concurred.

In the Matter of the Judicial Settlement of the Accounts of S. FRANK SWARTHOUT, as Executor, etc. FRED T. BUTTERS and Others, Appellants; H. ALLEN WAGENER, Respondent.— Order affirmed, with ten dollars costs and disbursements against the appellants Butters. All concurred.

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\* See Consol. Laws, chap. 61 (Laws of 1909, chap. 99), § 2, subd. 1, as amd. by Laws of 1912, chap. 13.— [REP.]

WILLIAM H. HARDING, Appellant, v. DANIEL B. CAVANAUGH, Respondent.— Judgment and order affirmed, with costs. New trial to be had in Municipal Court of Syracuse on the 19th day of December, 1917, at ten A. M. All concurred.

KEZIA HARRINGTON, Respondent, v. MYRNA SCHILLER, Defendant, and CHARLES A. WHITE, as Administrator, etc., and Another, Appellants.— Judgment reversed and new trial granted, with costs to appellants to abide event. Held, that the testimony of plaintiff and of the witness, Myrna Schiller, tending to show a delivery of the deed by Mrs. Schiller in her lifetime to the plaintiff, and as to other personal transactions between them, or either of them, and Mrs. Schiller in her lifetime, was incompetent under section 829 of the Code of Civil Procedure. All concurred.

FRANK SULLIVAN SMITH, Individually and as Receiver, etc., Respondent, v. PACIFIC IMPROVEMENT COMPANY and Another, Appellants, Impleaded with Others.— Order granting injunction reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to the plaintiff to renew the application at Special Term. Held, that plaintiff should have been required to give security as is provided by section 620 of the Code of Civil Procedure and that the amount thereof should be sufficient to fully indemnify the defendants against any loss by reason of granting the injunction. In view of this disposition it is unnecessary for us to pass upon the appeal from the order denying the motion to vacate, and the appeal from that order is dismissed. All concurred.

JOSEPH CANGIMILA, by MARY GALLO, His Guardian ad Litem, Appellant, v. E. W. EDWARDS & SON, Respondent.— Judgment of County Court reversed and judgment of Municipal Court affirmed, with costs to plaintiff in this court and in the County Court. Held, that the presumption of negligence on the part of defendant arising from the nature of the accident was not so met by evidence in favor of defendant as to have required the trial court to hold as matter of law that the plaintiff could not recover and we do not think the decision of the trial court was against the weight of the evidence. All concurred.

CHARLES CANGIMILA, Appellant, v. E. W. EDWARDS & SON, Respondent.— Judgment of County Court reversed and judgment of Municipal Court affirmed, with costs to plaintiff in this court and in the County Court, upon the grounds stated in the decision in the case of *Cangimila v. Edwards & Son* (ante, p. 968), decided herewith. All concurred.

EVA MILLER SZKLARSKI, as Administratrix, etc., Respondent, v. THE CANADIAN NIAGARA POWER COMPANY, LTD., Appellant.— Judgment and order affirmed, with costs. All concurred.

JOHN MAYER and Another, Respondents, v. MICHIGAN CENTRAL RAILROAD COMPANY, Appellant.— Judgment affirmed, with costs. All concurred.

ROYAL M. BATES, as Administrator, etc., Respondent, v. LORENZO H. DENN, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event. Held, that the credibility of the witness Smiley was for the jury; that it was a question of fact whether the

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note was actually made and delivered to plaintiff's intestate and also whether the loan was made to the witness Smiley, or to the firm. All concurred.

FLOYD KENT, Respondent, v. ERIE RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

NICOLA TETI, Appellant, v. JAMES F. LEAHY, Respondent.— Judgment so far as appealed from affirmed, with costs. All concurred.

MARY ELLEN LONG, as Sole Administratrix, etc., Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

FRANK B. HODGES and Others, as Trustees, etc., Respondents, v. OSWEGO CITY SAVINGS BANK, Appellant.— Interlocutory judgment affirmed, with costs, with leave to defendant to plead over within twenty days upon payment of costs of the demurrer and of this appeal. All concurred.

GEORGE REDMAN, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.— Judgment and order affirmed, with costs. All concurred.

HAROLD GREENSTEIN, Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.— Order affirmed, with costs. All concurred.

S. RAE HICKOK, Respondent, v. WILLIAM R. GANTLEY and Another, Appellants.— Judgment and order affirmed, with costs. All concurred.

JOHN DZINGELEWSKI, as Administrator, etc., Respondent, v. THE CITY OF SYRACUSE, Appellant.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

JOHN S. LAPP, Respondent, v. THE LOCKE INSULATOR MANUFACTURING COMPANY, Appellant.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

In the Matter of CHARLES M. GAFFNEY, an Attorney and Counselor at Law.— Petition granted and order of disbarment entered against the said Charles M. Gaffney.

MANION BROTHERS COMPANY, INC., Respondent, v. SENECA ENGINEERING COMPANY, Appellant, and DANIEL M. BEACH, Defendant.— Motion granted and appeal dismissed, with costs.

NEIL & PARMALEE CO., INC., Appellant, v. ELMER E. SHARP, Respondent.— Appeal dismissed, without costs, upon stipulation filed.

BERTHA J. EYSAMAN, Individually and as Executrix, etc., Respondent, v. WALTER NELSON and Others, Appellants, Impleaded, etc.— Appeal dismissed, without costs, upon stipulation filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ERNEST WARD, Appellant.— Judgment of conviction affirmed. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JUSTUS GAYNES, Appellant.— Judgment of conviction affirmed. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH TURPIN, Appellant.— Judgment of conviction affirmed. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK SALAMA, Appellant.— Judgment of conviction affirmed. All concurred.

CARL W. GRULICH, Respondent, v. CHARLES PAINE, Appellant.— Judgment and order reversed, with costs, and complaint dismissed, with costs. Held, that the plaintiff was guilty of contributory negligence as matter of



law. All concurred, except Kruse, P. J., who dissented and voted for affirmance.

LUCY FRITZ, Appellant, v. NEW YORK STATE RAILWAYS, Respondent.—Order affirmed, with costs. All concurred.

STEPHEN KAMINSKI, Appellant, v. THE POLISH NATIONAL CATHOLIC CHURCH OF THE HOLY MOTHER OF THE ROSARY, OF BUFFALO, N. Y., Respondent.—Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, unless within ten days from the service of a copy of this order with notice of entry thereof, the defendant stipulates that the certificates or notes described in the complaint may be received in evidence on the trial and shall constitute *prima facie* evidence of indebtedness of defendant as stated therein and of the execution of said certificates or notes, and in case the defendant so stipulates the order appealed from is affirmed, without costs. All concurred.

In the Matter of the Estate of LILLIAN ROUSSEAU, Deceased. GEORGE E. ZEILER, Appellant; ALBERT C. PARDEE, as Administrator, etc., Respondent.—Order affirmed, with costs. All concurred.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CORA ALICE WHEELER, Respondent, v. ETHAN A. NEVIN, as Superintendent of the State Custodial Asylum for Feeble-Minded Women, Appellant.—Order affirmed, with costs. All concurred.

JAMESTOWN MANTEL COMPANY, Respondent, v. BE GLAD CONSTRUCTION CORPORATION and Another, Appellants.—Judgment affirmed, with costs. All concurred: Lambert, J., not sitting.

THOMAS J. NORTHWAY, Plaintiff, v. FRANK CONLON, Defendant.—Plaintiff's exceptions overruled and motion for new trial denied, with costs to the defendant. All concurred.

ANNA PATAKI, Appellant, v. STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Respondent.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

BUFFALO CAREY COMPANY, Respondent, v. ARVILLA E. C. DUNN, Appellant.—Order entered dismissing appeal, with costs, upon affidavit filed by respondent's attorney showing that appellant has failed to comply with terms of order entered September 28, 1917.

DAVID M. HANCOCK, Respondent, v. PENNSYLVANIA COMPANY, Appellant.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

THOMAS H. DOWD, as Administrator, etc., Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.—Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

ALSOE E. HAZELWOOD, Respondent, v. BYRON M. LYON, Appellant.—Motion to dismiss appeal granted, unless appellant shall file and serve printed papers within twenty days and printed briefs within ten days thereafter.

Admitted to Practice as Attorneys and Counselors at Law, upon Examination:

At September Term, 1917: HAROLD E. ORR, of Buffalo; EDWARD CORNELIUS LYNCH, of Syracuse; JOHN EMMETT O'BRIEN, of Shortsville; FRANK

App. Div.]

Fourth Department, December, 1917.

WILLIAM WEEKS, JR., of Rochester; CHESTER P. MORRISSEY, of Syracuse; ERNEST CHARLES MURRAY, of Syracuse; LEWIS SMITH CARR, of Syracuse; RAYMOND EDMUND STEFFERSON, of Syracuse; GARSON BALDWIN, of Rochester; BYRON S. FOX, of Rome; HENRY EDWARD DODD, of Syracuse; CHARLES H. GOEBEL, of Syracuse; W. TAYLOR SHEALS, of Syracuse; JOSEPH J. DESMOND, of Buffalo; GEORGE T. DRISCOLL, of Buffalo; JOHN S. LEONARD, of Jamestown; MICHAEL J. MONTESANO, of Buffalo; CHARLES JEROME MONDO, of Rochester; JOSEPH A. SCHWENDLER, of Buffalo; FRANCIS M. SKIVINGTON, of Mumfords; LEWIS L. CROWLEY, of Rochester; WHITMAN G. ASHEY, of North Collins; COSMO A. CILANO, of Rochester; HUGH R. REYNOLDS, of Geneva; LEONARD S. ZARTMAN, of Waterloo; HARRY J. DOYLE, of Syracuse; SAMUEL LEVY, of Syracuse; LIONEL OSCAR GROSSMAN, of Syracuse; C. LEONARD O'CONNOR, of Syracuse; CARROLL E. SUTTER, of Webster; GEORGE R. ROTHFUS, of Buffalo; JOHN H. FARNHAM, of Syracuse; WILBUR R. LUTTON, of Syracuse; HARRY GINSBURG, of Buffalo; DUDLEY A. WILSON, of Buffalo.

At November Term, 1917: JACOB SICHERMAN, of Buffalo; EDMISTON HAGMEIR, of Buffalo; CLARENCE J. FOERTCH, of Syracuse; ARTHUR NOBLE GLEASON, of Utica; WILLIAM J. HAYES, of Syracuse; MORRELL K. BREWSTER, of Syracuse; MYER MILLER, of Rochester; SAMUEL LEVY, of Rochester; ALCOTT NEARY, of Rochester; SIDNEY B. COOPER, of Watertown.



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A mere charge that the defendants assaulted the plaintiff is a mere conclusion and not a statement of facts sufficient to authorize a recovery for assault.

*Held further*, that the complaint did not allege facts necessary to sustain an action for malicious prosecution in that it does not appear that the legal prosecution terminated favorably to the plaintiff.

Where the plaintiff alleged that he was held by the magistrate and found guilty by the Court of Special Sessions it will be inferred that he received a suspended sentence. The plaintiff must allege what is tantamount to the termination of the criminal prosecution favorably to him.

*Held further*, that the complaint contained allegations sufficient to sustain the action as one for false arrest and imprisonment in that plaintiff was arrested for a misdemeanor without legal process, in which case the arrest could only be justified if the crime were committed in the defendants' presence. The burden of showing the latter fact is upon the defendants.

Even if the arrest of the plaintiff were lawful it cannot be held as a matter of law that there was no unnecessary delay in taking him before a magistrate, or delivering him to a peace officer, as required by section 185 of the Code of Criminal Procedure. Such unnecessary delay makes the arrest unlawful regardless of whether or not the plaintiff was guilty of crime. *Hendrix v. Manhattan Beach Development Co.*, 111.

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**ATTORNEY AND CLIENT — Continued.**

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2. *Suspension from practice — unlawful refusal to return letters to client — misappropriation of money due to counsel.* Attorney at law suspended from practice for refusing to return to a client letters upon which he had no lien or claim, and for failure to pay counsel engaged by him, and for the appropriation to his own use of the money due such counsel. *Matter of Youngentob*, 490.

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4. *Charges of professional misconduct in inducing client to sign deed of trust and execute contingent fee agreement not sustained — attorney severely censured for commingling trust fund with his own and using same and for making certain investments — effect of prior good reputation in community and lack of willful dishonesty.* Charges against an attorney at law of professional misconduct in inducing his client to sign a deed of trust and an agreement for a contingent fee of twenty-five per cent of whatever he might be able to secure for her in the settlement of her husband's estate, *held*, not to have been sustained by the evidence.

Said attorney should be severely censured, however, for commingling the trust fund with his own, and at times using it as his own, and also for investing the funds in second mortgages and in corporate stock.

The fact that said attorney appears to have maintained a good reputation in the community and does not appear to have been guilty of willful dishonesty has protected him from more severe disciplinary measures. *Matter of Roth*, 618.

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**BILLS AND NOTES.**

1. *Action to recover damages because of refusal of bank to honor check — evidence showing right to nominal damages only — proof necessary to sustain verdict for substantial damages — new trial.* Action to recover damages for a refusal of the defendant bank to honor a check drawn upon it by the plaintiff who was a depositor. Evidence examined, and *held*, that the plaintiff is entitled to recover at least nominal damages.

But the plaintiff cannot base a right to substantial damages upon mere proof that the check was drawn in favor of a person who manufactured an invention of the plaintiff's and the dishonor of the check incensed the payee to a degree where he refused to proceed with the manufacture unless he were paid in advance, etc., where it does not appear that the defendant had knowledge of the plaintiff's contract with the payee, or could have

**BILLS AND NOTES — Continued.**

foreseen that its refusal to pay the check would lead to an abrogation of the contract, as such result was not within the contemplation of the parties.

Although the judgment rendered on a verdict for substantial damages is reversed, a new trial will be granted, with costs to abide the event, as the plaintiff may be able to show facts on a new trial entitling him to substantial damages. *Meyer v. Hudson Trust Co.*, 69.

2. *Presentation of check through clearing house and tentative entry thereof on books of drawee — return of check on notice of insolvency of drawer — when no acceptance which entitles payee to recover of drawee — estoppel — custom of clearing house.* Where the plaintiff, a bank named as payee of a check drawn upon the defendant bank, forwarded the instrument to its correspondent for collection and the correspondent presented the check through the New York clearing house, of which the drawee was also a member, and the drawee on receiving the check through the clearing house made a tentative entry thereof on its books, but did no unequivocal act indicating an intention to pay the check and returned it the same day to the correspondent bank on learning that the drawer had been taken over by the banking department of a foreign State, the payee is not entitled to recover on the theory that the drawee had irrevocably accepted the check.

On the facts aforesaid there is no estoppel as between the payee and drawee, as the latter neither canceled the check, nor marked it paid, nor retained it.

The plaintiff not being a member of the New York clearing house, is not bound by the constitution and rules of that institution. *First National Bank v. National Park Bank*, 103.

3. *Action on promissory note — evidence — discharge of maker in bankruptcy proceedings — Statute of Frauds — promissory note as memorandum of promise to pay debt discharged in bankruptcy.* Where a plaintiff sued upon a promissory note claimed to have been the last of a series of renewals it was error for the court to exclude evidence of a prior discharge of the defendant in bankruptcy in which a prior note of the defendant was scheduled, if the defendant claims the note in suit was given without consideration for the accommodation of the plaintiff and its amount was different from the amount of the prior note and it was not given when the prior note became due so that it was not a renewal thereof.

*It seems*, that a note given subsequent to the discharge in bankruptcy of the maker pursuant to an oral agreement to revive a debt discharged in bankruptcy is a memorandum of the agreement in writing within the requirements of subdivision 5 of section 31 of the Personal Property Law. *Stokes v. Sanders*, 249.

4. *Inquiry as to funds of drawer — acknowledgment that drawer has requisite funds on deposit does not amount to acceptance of bill — pleading — complaint not stating cause of action — foreign law not well pleaded.* Where a foreign bank, upon which a bill of exchange was drawn, on receiving a telegram from another bank which was contemplating the purchase of the bill inquiring whether the defendant would pay a draft of the drawer for a certain sum of money, replied by telegram that such draft was good, it did not thereby accept the draft and is not liable thereon.

The defendant's reply stating that the draft was good meant only that the drawer had the amount of the draft at that time on deposit with the defendant and did not bind it to hold the funds, or amount to an acceptance.

A drawee cannot be held liable upon a contract of acceptance external from the bill unless the language used clearly and unequivocally imports an absolute promise to pay.

The plaintiff cannot recover on a second cause of action restating the facts aforesaid and also alleging, in substance, that under the law of Mexico, where the draft was drawn and where the drawee resided, a drawee must accept or refuse to accept on the same day a draft is presented for that purpose, and if the drawee allows the day to pass without returning the draft he is liable for its payment, and that the drawee retained the draft for a much longer period, where the allegations do not show that said law was in effect when the transactions occurred. A demurrer will be sustained to a complaint which merely sets forth the facts aforesaid. *Colcord v. Banco De Tamaulipas*, 295.

**CARRIER.**

1. *Agreement to transport dog through other carrier — interstate commerce — deviation from agreed route by carrier — burden of showing freedom of negligence cast upon carrier — proof justifying recovery.* Where an express company specifically agreed to transport the plaintiff's dog to a city in a foreign State by another specified express company, but, in contravention of the agreement, did not deliver the animal to the specified carrier and carried it over its own line by a different route and the dog died in transit, the burden of showing negligence of the defendant as required by the interstate bill of lading is not upon the shipper, but, on the contrary, as the carrier willfully deviated from the stipulated route, it became an insurer to the extent of proving that the death of the animal was not due to its own act or negligence.

The Carmack amendment to the Interstate Commerce Act does not disturb such common-law liability.

*It seems*, that under the law of this State a carrier, in the absence of a limiting contract, is liable as in the case of inanimate property for the transportation of live animals, except as to injuries arising from their nature and propensities and which diligent care cannot prevent.

Evidence examined, and *held*, sufficient to justify a finding that the defendant was negligent and that the plaintiff was entitled to recover. *Ely v. Barrett*, 176.

2. *Evidence not establishing agreement to deliver goods within certain time — proof improperly received affords no basis for amendment of pleadings to conform thereto — agreement with shipper to expedite shipment at regular rates in violation of Interstate Commerce Act — liability of carrier under bill of lading for damage to goods in transit — consequential damage.* In an action by a shipper against a carrier for failure of the latter to deliver goods shipped within a certain period, evidence *held* insufficient to sustain a finding that there was an agreement between the plaintiff and the defendant by which the latter agreed to deliver plaintiff's goods not later than a certain date.

A complaint alleging an agreement by the defendant to deliver a shipment by the plaintiff not later than the fourth morning following receipt thereof, will not be amended at the trial so as to provide that the agreement was to deliver "at all events with reasonable dispatch and within a reasonable time" in order to conform the pleadings to proof which had been improperly received under objection and exception.

An agreement with a particular shipper to expedite a shipment at regular rates, where no rate has been published for expediting, is a discrimination and a violation of the Interstate Commerce Act, and relief thereon will be denied.

The rights of a shipper and a connecting carrier are to be measured solely by the bill of lading issued by the initial carrier.

Under a bill of lading providing that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment, the shipper is entitled only to the actual damage to its property, and not to any consequential damage arising either from its delayed delivery or from an inability to use it for any period of time because of its damaged condition. *Grossman Manfg. Co., Inc., v. N. Y. C. R. R. Co.*, 764.

3. *Transportation of live stock — Interstate Commerce Act — oral contract for transportation in violation of Federal statute — estoppel — shipper cannot take advantage of reduced rate and repudiate uniform contract authorizing same — erroneous charge — new trial.* Where schedules filed by a common carrier under the Interstate Commerce Act show its charges for transporting live stock and provide for a uniform bill of lading, fixing a reduced rate at which it will carry live stock, while a rate ten per cent higher is charged if a consignor refuses to execute a "uniform live stock contract," both the shipper and carrier are bound to know that an oral contract for transportation fixing no rate or valuation of the stock is a violation of the Federal act. Hence a consignee whose live stock died in transit because they were not unloaded during ninety-eight hours of transit cannot recover more than the amount limited in a uniform bill of lading upon the contention that



**CARRIER** — *Continued.*

said bill of lading was executed without authority and that the agent of the consignor made an oral contract of shipment which fixed no rates. This, because in such case the Interstate Commerce Act and the schedules and bills of lading filed and issued in pursuance thereof would become ineffective.

Moreover, the plaintiff cannot have the reduced rate and disclaim the contract authorizing such rate, otherwise he would be obtaining a discretionary rate and gaining for a lesser charge the benefits of the higher charge.

It was error for the court to charge that the jury might find the oral contract alleged by the plaintiff, for if such oral agreements could be sustained the door is open to all manner of special contracts departing from the schedules and rates filed with the Interstate Commerce Commission.

Although the jury might have found that an agent of the carrier denied the person accompanying the live stock an opportunity to unload them during transit, the error in the charge aforesaid allowing the jury to find the oral contract alleged by the plaintiff requires a new trial. *Dickerson v. Erie Railroad Co.*, 815.

Liability of express company for delay.

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**CERTIORARI.**

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Such order does not finally determine the rights of the parties nor constitute an order in the sense that it may be reviewed by certiorari. *People ex rel. Pennsylvania Gas Co. v. P. S. Comm.*, 147.

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**CODE OF CIVIL PROCEDURE.**

[For table containing all sections cited and construed in this volume, see *ante*, p. lxxxiv.]

**CODE OF CRIMINAL PROCEDURE.**

[For table containing all sections cited and construed in this volume, see *ante*, p. lxxxiv.]

**CODE OF PROCEDURE.**

[For table containing all sections cited and construed in this volume, see *ante*, p. lxxxii.]

**COMMERCIAL PAPER.**

See BILLS AND NOTES.

**CONDEMNATION.**

See EMINENT DOMAIN.

**CONSERVATION LAW.**

*Action to recover penalty for violation of section 191 — possession without permit of wild deer lawfully killed in State of Maine.* The possession of wild deer or venison lawfully taken in the State of Maine and transported to this State for the personal use and consumption of the defendant, without a shipping permit issued by the State Conservation Commission, does not constitute a violation of the provision of section 191 of the Conservation Law, providing that "Wild deer or venison lawfully taken may be possessed from October first to November twentieth, both inclusive."

**CONSERVATION LAW — Continued.**

It is only under the second sentence of said section, providing that "a person may possess such deer or venison from November twenty-first to February first, both inclusive, provided a license so to do shall first be obtained from the Commission," that it is necessary to procure a license in order that possession shall be lawful. *People v. Bisbee*, 40.

**CONSOLIDATED LAWS.**

[For table containing all sections cited in this volume, see *ante*, p. lxxxvii.]

**CONSTITUTIONAL LAW.**

1. *Constitutionality of chapter 658 of the Laws of 1915 authorizing Court of Claims to hear and determine claim of State employee for which the State would not otherwise be liable.* Chapter 658 of the Laws of 1915, authorizing the Court of Claims to hear, audit and determine the claim of an electrician employed by the State at a State hospital for the insane, for injuries alleged to have been sustained by him in the course of his employment by reason of an assault committed by an insane patient, and further providing that, if the court found the injuries were so sustained, the damages should constitute a legal and valid claim against the State, is constitutional, even though no legal liability otherwise existed.

Said act does not audit or allow the claim so as to violate section 19 of article 3 of the Constitution, or give or loan money or credit of the State "to or in aid of any association, corporation or private undertaking" in violation of section 9 of article 8 of the Constitution, nor does it appropriate public moneys for local or private purposes, within the meaning of section 20 of article 3 of the Constitution. *Munro v. State of New York*, 30.

2. *Statute authorizing establishment of police districts and election of police justices within towns.* Chapter 583 of the Laws of 1909, as amended by chapter 294 of the Laws of 1910, being an act to authorize the several towns in the county of Suffolk to establish police districts outside the limits of any incorporated village therein, and to elect within such districts by ballot one police justice, three commissioners and to provide for police patrolmen within said districts, is unconstitutional.

A town or village may be divided for police protection but not for a separate court, since such portion cannot be thus dissevered from the rest of a municipality for judicial purposes. *People v. Paris*, 499.

3. *Chapter 202 of the Laws of 1917 amending Election Law in relation to commissioner of elections of county of Niagara — purpose of provision of Constitution that no private or local bill shall embrace more than one subject — essential contents of title of bill — general or special city law, what constitutes — who may attack constitutionality of statute.* Chapter 202 of the Laws of 1917, entitled "An act to amend the Election Law, in relation to commissioner of elections in the county of Niagara," is not unconstitutional upon the ground that it violates section 16 of article 3 or section 2 of article 12 of the Constitution.

The purpose of section 16 of article 3 of the Constitution, providing that "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title," was to prevent concealing in the body of a local statute a foreign subject not germane to that mentioned in the title and so unrelated thereto as to cause surprise upon its discovery.

If the title of a local law expresses a general purpose or object all matters fairly and reasonably connected therewith and all measures which will or may facilitate the accomplishment of such purpose or object are properly incorporated into the act and are germane to the title.

It is not necessary to set forth in the title the various details of the object or purpose to be accomplished by the bill. It is sufficient if the title expresses its general purpose.

Chapter 202 of the Laws of 1917 concerns the whole State as regards its general elections, and the county of Niagara in particular. Its operation and effect upon the three cities in said county is incidental only and does not affect the municipalities as such. Hence, it does not violate section 2 of article 12 of the Constitution upon the ground that it relates to the property, affairs or government of the cities in said county and was not after its passage by the Legislature submitted to the mayor and common

**CONSTITUTIONAL LAW — Continued.**

council of said cities as "special city laws" are required to be submitted. Even if said statute does violate section 18 of article 3 of the Constitution, which prohibits the Legislature from passing a "private or local bill \* \* \* designating places of voting," this is not a question in which members of the board of elections for Niagara county are interested or which they are entitled to have decided, as the invalidity thereof would not enable them to continue to hold their offices. This, because said part of the statute is not essential to the operation of the other portions thereof and if pronounced invalid the remainder will not fall with it. *Vroman v. Fish*, 502.

Canvass of soldier votes.

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Practicing denistry under assumed name.

See PUBLIC HEALTH LAW.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, p. lxxv and lxxvi.]

**CONTRACT.**

1. *Agreement of manufacturer to share profits with purchasers of its product — purchaser entitled to profit on fulfillment of conditions — contract between purchaser and selling agent does not bar recovery.* Where the defendant, a manufacturer of automobiles, for the purpose of giving publicity to its products, advertised that it would give to all retail buyers of its automobiles a certain share of its profits during the current year, providing the defendant sold a certain number of cars, one who purchased an automobile from an agent of the defendant, or the purchaser's assignee, is entitled to receive a share of the profits, the conditions of the advertisement having been fulfilled, and payment cannot be refused upon the ground that the bill of sale of the car given by the agent some months after the actual sale stated that the sale did not come within the provisions of the defendant's offer. The agreement of the defendant through its advertisement was an entirely different transaction than the sale of the car between the purchaser and the agent.

Said promise of the defendant to divide profits was not a mere gratuity, but a request to the public which, when acted upon, was binding. *Ford v. Ford Motor Co.*, 28.

2. *Equitable assignment — agreement by bridge company to pay attorney from moneys due under contract — liability of president and director of company for converting money equitably assigned.* Where a bridge company retained an attorney to aid it in the procuring and execution of a contract with the city of New York, and agreed that said attorney should receive a certain sum for his services out of the final payment by the city, and after said attorney had furnished all the services required by the company, its president promised and agreed to notify him when the city would be ready to pay the final estimate, and later the bridge company and its president agreed that said attorney was entitled to and should receive his share of the final estimate and that a separate check should be given him therefor by the city, and thereafter, without notice to said attorney, the president of the bridge company notified a director to draw the entire amount due from the city and this was done and the proceeds deposited to the credit of the bridge company and used in the payment of his debts, among which was a debt to a partnership of which the president of the bridge company was a member, said agreement between the attorney and the bridge company operated as an equitable assignment to the attorney and the president and director of said company incurred a personal liability when they converted the amount due the attorney to their own use.

Any writing, words or act which indicate the intent of the assignor to make appropriation of a fund or a part of it and from which an assent by the assignee to receive may be inferred, will, in equity be enforced as an assignment if sustained by a sufficient consideration. *Lynch v. Conger*, 221.

3. *Action for breach of contract for production of musical play — contract construed — alleged violation of rights of publication — parties — "person with whom or in whose name a contract is made."* In an action for the breach of a contract for the production of a musical play, originally written in

**CONTRACT** — *Continued.*

German, because of alleged violation of plaintiff's reserved right of publication of songs and lyrics extracted from the play, it appeared that said rights were reserved to the plaintiff subject to the qualification "but this applies only to numbers belonging to the Karczag Publishing Co., and to no other songs or interpolations." The contract further provided as follows: "The party of the second part further agrees that it will not make any more alterations, cuts or additions in its English version of the said play than appear to it or the producer necessary or desirable for the success of the said play, and in case the Karczag Publishing Company does not furnish interpolations satisfactory to it or the producer, or does not deliver such as may at such times prior to the production, be requested by the second party, then the party of the second part may make interpolations of any songs as may be necessary in its judgment, and to obtain such songs, musical numbers or interpolations elsewhere."

*Held*, that the meaning of the above provision was that the party of the second part, the Shubert Company, or its producer, was to be the sole judge of what alterations, cuts or additions were necessary, and were bound to accept only such interpolations as it or he found satisfactory. Said provision of the contract cannot be construed as limiting the Shubert Company in obtaining satisfactory interpolations so that it could seek them elsewhere only after the plaintiff had been requested to furnish them and had refused or had furnished unsatisfactory ones.

Since the Shubert Company retained the publishing rights of the interpolations, which it obtained elsewhere, and since it is only regarding these numbers that plaintiff complains, it has no cause of action.

The plaintiff being a mere agent of the party of the first part to the contract, and its only interest in collections made thereunder being the stipulated percentage which it is entitled to retain, it is not "a person with whom or in whose name a contract is made for the benefit of another" within the meaning of section 449 of the Code of Civil Procedure, so as to render it competent to sue. *Karczag Pub. Co., Inc., v. Shubert Theatrical Co.*, 529.

4. *Action on contract to recover balance alleged to be due for services in obtaining new accounts in defendant's bank — right of bank to reject small amounts as undesirable and refuse payment for obtaining them.* In an action on contract to recover a balance alleged to be due the plaintiff for services in obtaining new accounts in defendant's bank, pursuant to a written agreement, it appeared that amounts as low as one dollar each were contemplated and regularly accepted; that long after the accounts were turned in and payment therefor made to the plaintiff on account of many of them, the bank determined that several new accounts were undesirable solely because of their amount, and refused to pay the agreed commissions, and that, although the bank notified the plaintiff that it considered the accounts undesirable, it thereafter retained and never canceled them.

*Held*, that the bank could not retain the deposits and have the use of the money and to this extent the benefit of plaintiff's services and at the same time take the position that it had rejected the accounts as undesirable, and that, therefore, the direction of a verdict upon its counterclaim for alleged overpayments on such accounts was erroneous. *Bankers Service Corporation v. Second Nat. Bank*, 655.

5. *Statute of Frauds — parol agreement extending time of payment of mortgage not to be performed within one year — part performance — payment of consideration — when Statute of Frauds need not be pleaded as a defense — evidence — cumulative evidence.* A parol agreement to extend the time of payment of a mortgage not to be performed within a year is invalid under the Statute of Frauds.

Where the invalidity of a contract under the Statute of Frauds is apparent upon the face of the pleading or is such as pleaded that the proof may show it to be obnoxious to the statute, the objection to be availed of must be taken by answer, reply or demurrer.

But where an agreement as pleaded in an answer does not contravene the Statute of Frauds, but the proof which does not follow the pleading discloses that said agreement is obnoxious to the statute, the void agreement will not be enforced, notwithstanding the failure to plead the statute.

Where in a suit to foreclose a mortgage the sole defense relied upon is an alleged parol extension agreement, and the only one of the defendants

**CONTRACT** — *Continued.*

who had personal knowledge thereof testified fully and repeatedly that he had nothing to add to or alter in his evidence, and it is not suggested that the defendants had any witnesses to prove a different agreement, it was not error for the court to direct judgment for the plaintiff without permitting other witnesses to be called by the defendant to prove the same agreement, as such evidence would have been merely cumulative.

Where a mortgagor agrees by parol to extend the time of payment of the mortgage upon receipt of eight semi-annual installments of \$500 each, the payment of said installments does not constitute a part performance so as to render the contract valid under the Statute of Frauds.

The exception made by section 31 of the Personal Property Law, where the contract is for the purchase of personal property exceeding fifty dollars in value, does not apply to the above agreement.

Payment even to the whole amount of the purchase money is not deemed such a part performance as to justify a court of equity in enforcing a contract void under the Statute of Frauds. *Williamsburg City Fire Ins. Co. v. Lichtenstein*, 681.

6. *Mutuality — provision against difficulties and hardships of performance — pleading — counterclaim must be complete in itself.* A contract by the owner of letters patent engaged in manufacturing articles thereunder, granting the exclusive selling rights to another who agrees to purchase a certain quantity at a fixed price, is not rendered void for want of mutuality by a provision that in case the owner of the patents shall not be able to furnish the articles as ordered by the other party to the contract, he shall not be held liable in damages by said party.

Said provision of the contract does not give the owner the right arbitrarily or of his own volition to terminate it. It is merely a protection against unforeseen difficulties that might arise which would, without his fault or neglect, make it impossible for him to perform.

In an action to procure the cancellation of a contract on the ground of fraud, a counterclaim for damages for breach on the part of the plaintiff is defective, where it fails to allege due performance by the defendant.

A counterclaim must be complete in itself, and the court cannot supply omissions or necessary allegations by reference to other parts of the answer or the complaint. *U. S. Expansion Bolt Co. v. Marmorstein*, 790.

Agreement to deliver goods within certain time.

*See CARRIER*, 2.

Breach of employment of actress — question for jury.

*See MASTER AND SERVANT*, 1.

Duty of loyalty by employee — disclosure of secret agreement with former employer.

*See MASTER AND SERVANT*, 2.

Employment — evidence raising question for jury.

*See MASTER AND SERVANT*, 5.

Action for wrongful discharge of servant.

*See MASTER AND SERVANT*, 6.

Agreement as to priority of holders of junior mortgage.

*See MORTGAGE*, 1.

Agreement between city and construction company — personal liability of contractor to abutting owner.

*See MUNICIPAL CORPORATION*.

Agreement creating joint adventurer — mutual duties of coadventurer and agents — secret sale.

*See PARTNERSHIP*, 1.

Advance of moneys to further enterprise — when agreement constitutes partnership.

*See PARTNERSHIP*, 3.

Agreement by doctor to cure disease — malpractice.

*See PHYSICIAN*.

Agreement to care for dog — negligence.

*See PLEADING*, 1.

**CONTRACT** — *Continued.*

Breach of agreement to convey land.

See PLEADING, 4.

Loan of stock returnable on demand — demurrer — insufficient complaint.

See PLEADING, 7.

Refusal to perform contract — sufficient complaint.

See PLEADING, 9.

Action for breach of contract cannot be sustained as one in tort.

See PLEADING, 10.

Special employment of real estate broker — appeal.

See PRINCIPAL AND AGENT, 3.

Specific performance of agreement to give lease.

See REAL PROPERTY, 2.

See SALE.

**CONVERSION.**

Conversion of client's money by attorney.

See ATTORNEY AND CLIENT, 1, 3.

**CORPORATION.**

1. *Representative action by stockholder — pleading — failure to allege or prove demand that directors bring action — failure to establish illegality of payments made by directors — employment of counsel to contest receivership — executors of deceased director not liable for subsequent acts of directors — director who did not participate in wrongful expenditures not liable.* A stockholder cannot maintain a representative action in behalf of his corporation against directors to recover moneys of the corporation alleged to have been illegally disbursed in the absence of allegation and proof that the plaintiff, before commencing the action, either requested the directors to sue in the name of the corporation and had met with a refusal, or that for any reason it would have been futile to make such demand.

*It seems, that directors of a corporation cannot be charged with moneys paid to counsel in resisting the appointment of a receiver of the corporation where it appears that the Court of Appeals materially restricted the scope of the receivership and the amount paid was reasonable.*

*It seems, that it was error to charge the executor of a deceased director of the corporation with expenditures made by other directors after the testator's death.*

*It seems, that a director who did no wrongful act and did not participate in making alleged illegal payments cannot be charged with liability merely because he was a director at the time.* *Godley v. Godley & Crandall Co.*, 75.

2. *Application by foreign corporation to do business within this State — refusal of said corporation to change its name so as to distinguish it as a corporation — when corporation not reorganized successor of another so as to be entitled to use its name.* Where the name of a foreign corporation does not "clearly indicate" that it is a corporation and it is unwilling to use "in this State such an affix or prefix" as will indicate the necessary distinction, the Secretary of State may deny its application under section 15 of the General Corporation Law for a certificate authorizing it to do business within this State.

Said corporation is not the reorganized successor of another foreign corporation of the same name, so as to entitle it to the benefit of the provisions of section 6 of the General Corporation Law, where it has in no sense succeeded to the franchises of the other corporation and has not supplanted or taken the place of the old corporation. *People ex rel. United Verde Copper Co. v. Hugo*, 149.

3. *Dissolution — agreement by stockholder to pay certain sum from his distributive share upon dissolution of corporation — suit to foreclose deed, executed under such contract, as a mortgage.* In a suit to foreclose a deed as a mortgage, it appeared that the conveyance was made to assure the obligation of one C. under a tripartite contract executed between him, three other stockholders and the plaintiff; that the maximum amount of money receivable thereunder was \$6,500, which was to accrue from a fund arising from C.'s distributive share upon the dissolution of the corporation

**CORPORATION** — *Continued.*

in which he had a controlling holding; that the assets out of which the fund should arise were not limited to personal property, but included the corporation's real estate; that C. being also a creditor of the company, stipulated in the agreement that he would "not assert or enforce any claim \* \* \* until after the payment of the \$6,500;" that on the same day C. and one Y. made another agreement which recited that C. had assigned to Y. claims against the corporation and had obligated himself to pay the \$6,500, and thereupon C. and Y. agreed that the assigned claim should be enforced only against the real property of the corporation "and that even in the latter event the proceeds of the enforcement of such sale, whether in cash or represented by real estate or other property" shall be held by V. and the plaintiff "until such time as the \$6,500 above mentioned shall have been paid in accordance with the terms of the agreement referred to;" that upon the dissolution of the corporation C.'s distributive share from the sale of the personal property being insufficient to pay the \$6,500, the real estate instead of being sold was conveyed by the corporation to one S. in payment of a debt which the corporation at one time owed C., but which had been assigned by him to Y., and also to indemnify the corporation against other liabilities, and was by S. conveyed to plaintiff and V.

*Held*, that under the agreements the payment of the \$6,500 was to be preferred and paid from the sale of all the assets on dissolution, and that if the real estate should be otherwise applied to C.'s claim, the plaintiff and V. should hold the resultant property until the \$6,500 should be paid; that, therefore, unless the balance of said amount be paid with interest and costs, the real estate should be sold to satisfy said balance and the remainder paid to plaintiff's grantor or his assigns. *Steinbrink v. Vause*, 378.

4. *Suit to compel issuance of certificates of stock — evidence of ownership — parties defendant — appeal — matters not shown by record — issuance of certificates in excess of capital.* In a suit to compel a corporation to issue to the plaintiff a certificate for a certain number of shares of its capital stock, evidence held sufficient to establish that the plaintiff was the owner and entitled to the certificate.

It is well settled that a suit in equity by a stockholder will lie against a corporation to compel it to transfer its stock on the books of the corporation or to issue to him a certificate of stock, where it has wrongfully canceled his certificate.

As the plaintiff was able to prove his ownership and required no relief from one claimed by the defendant to be the owner of said stock, it was not necessary for the plaintiff to make such person a party defendant.

A judgment in favor of the plaintiff should not be permitted to stand where it appears that the defendant would be required to issue to him more than the entire amount of its present capital stock, it appearing from the evidence that its capital has been reduced.

As the record is barren with respect to the circumstances under which the capital was decreased or increased, there can be no adjudication concerning the validity thereof.

A corporation should neither be required to issue certificates in excess of its capital as authorized by law, nor should it be required to duplicate shares lawfully represented by outstanding certificates. *Selwyn-Brown v. Superno Co., Inc.*, 420.

5. *Validity of incorporation as telegraph company cannot be collaterally attacked — validity of incorporation must be determined in suit to which People of State is party — municipal corporations — secondary franchise to use public streets for electric wires must be obtained from municipal authorities — when no estoppel by permission of such use without secondary franchise.* A corporation which received its certificate from the State in 1883 and was organized under the provisions of the acts of 1848 and 1853 as a telegraph company, thereby became incorporated as a telegraph company, and the question as to whether its incorporation was invalid in that, instead of conducting a telegraph business strictly speaking, it engaged in the business of furnishing protection against burglary by a system of electric alarm, etc., cannot be raised collaterally by the city of New York in an action brought by such corporation to enjoin the city from interfering with the plaintiff in the operation of its alleged franchise rights in said municipality. The validity of the incorporation can only be raised by the People of the

**CORPORATION — Continued.**

State of New York, without whose presence before the court no adjudication on such issue can be made.

*It seems*, that an action to test the validity of such incorporation must be brought by the People of the State by whom the franchise was granted if, in the judgment of the proper State officials, any cause for such action exists.

Assuming, however, that the plaintiff was lawfully incorporated as a telegraph company under the acts aforesaid it did not thereby acquire any special franchise to operate its wires over or under the streets of the city of New York without the permission of the proper municipal authorities and, in addition to the franchise acquired from the State, it was also required to obtain from the city the special, or so-called secondary, franchise to use the city's streets for the maintenance of its wires and fixtures.

Moreover, the fact that the plaintiff for many years had been allowed to maintain its wires over private buildings and was subsequently required by the city of New York to place its wires in subways thereafter constructed, did not operate to estop the city from asserting that the plaintiff has no right to use the city streets except as authorized by a municipal or secondary franchise to do so, obtained from the proper municipal authorities.

It follows from the considerations aforesaid that the plaintiff's suit to enjoin the city from interfering with the operation of its lines was properly dismissed. *Holmes Electric Protective Co. v. Williams*, 687.

6. *Voluntary dissolution — special proceeding — costs — stipulations — stenographer's fees — referee's fees — when opposing stockholder and creditor not personally liable for costs and disbursements — authority of court to stay foreclosure instituted by opposing stockholder — when question not academic — revival of action against permanent receiver after dissolution — duty of court to wind up affairs of dissolved corporation — protection of receivers against actions.* The General Corporation Law relating to voluntary dissolution of corporations contains no provision with respect to the costs and expenses of the proceeding.

A proceeding for the voluntary dissolution of a corporation is a special one and, therefore, the provisions of the Code of Civil Procedure relating to costs in such proceedings govern.

There is no express statutory provision for taxing stenographer's fees, and the rule is that they are not taxable unless the parties have expressly stipulated that they may be taxed as disbursements.

Where, in a voluntary proceeding for the dissolution of a corporation, the attorneys for the petitioners and for the opposing stockholder who was also a creditor, stipulated that a stenographer be employed at a certain *per diem* fee, and his fee for copies of the minutes was also stipulated, and the affidavit of the stenographer shows that he had an understanding with the petitioners by which they were to pay one-half of his charges, and that it was at the suggestion of one of the attorneys that he entered the stipulation in the minutes in order to bind the opposing stockholder for one-half of his charges, and that thereafter by consent of counsel for the petitioners and for the opposing stockholder he made a minute of the stipulation, said stipulation should not be construed as authorizing the taxation of the stenographer's fees in the proceeding. It was evidently intended that they should be a joint charge against the responsible parties.

Where all parties in interest had notice of the dissolution proceeding and an opportunity to appear, a stipulation, fixing the referee's fees at an increased rate, consented to by all persons, is binding, although not agreed to by the attorney for the temporary receiver. This, because said receiver was not formally a party to the proceeding and had no authority to grant or withhold consent with respect to the referee's fees.

The court necessarily has implied authority to require that the expenses of the proceeding be paid out of the corporate property which it is required to administer and distribute and such is the practice in dissolution proceedings.

The costs and disbursements, with the exception of the stenographer's fees, should be paid by the permanent receiver from the corporate funds and should not be taxed against the opposing stockholder personally.

A stockholder opposing a voluntary dissolution proceeding should not be punished by having the costs and expenses taxed against him personally,



**CORPORATION** — *Continued.*

because he merely appeared therein, and by interposing an answer obstructed and delayed the proceedings to a certain extent.

The question as to whether the granting of an injunction in a voluntary dissolution proceeding restraining a foreclosure proceeding commenced by the opposing stockholder pending a reference was proper, is not academic, where said stockholder's right to costs of the appeal is involved.

An action to foreclose a lien upon property pledged or upon realty is not an action to recover "a sum of money," within the meaning of section 184 of the General Corporation Law, conferring authority on the court in dissolution proceedings to enjoin certain actions.

A foreclosure action, instituted by an opposing stockholder, pending a reference in a dissolution proceeding, may be stayed by the court, in order to enable the receiver to sell the equity of the corporation.

By a final order of voluntary dissolution a corporation ceases to exist, and a pending foreclosure action, instituted by an opposing stockholder, can proceed no further until it is revived against the permanent receiver.

When the statutory requirements for the voluntary dissolution of a corporation have been complied with and the corporation dissolved, it becomes the duty of the court to wind up the affairs of the corporation, and to that end to dispose of its property for the interest of the creditors and stockholders.

It is within the inherent power of the court to protect its receivers against actions brought without its consent and to deny its consent to the bringing of such actions and to enjoin any one, and especially a creditor and a party to the proceeding, from interfering with the property, the custody and title to which is in its receiver. *Matter of French*, 719.

Residence of domestic corporation.

See TRIAL, 2.

**COSTS.**

1. *Action against joint tortfeasors — effect of nonsuit as to one defendant — implied severance of action — when defendant entitled to costs although plaintiff has judgment against codefendant.* Where a husband and wife were sued jointly in an action for libel and a verdict was rendered against the husband, but a nonsuit was directed in favor of the wife, there was in effect a determination that the wife was not a tortfeasor but was a stranger to the transaction for which her husband was sued.

Hence, where she did not join in her husband's answer and was not united in interest with him in the subject-matter of the action, she is entitled to a judgment for costs, as the nonsuit as to her was in effect a severance of the action under sections 1204 and 1205 of the Code of Civil Procedure, which entitles her to costs.

The mere fact that the wife appeared by the same attorney as her husband does not deprive her of the right to costs. *Kozlowski v. Gomolski*, 234.

2. *Action in Supreme Court in Bronx county against defendant served in New York county — Code of Civil Procedure, section 3228, as amended, construed — statutes — repeal by implication.* Where a resident of the county of Bronx brings an action in the Supreme Court in said county against a non-resident of the State served in the county of New York to recover a balance of \$715 alleged to be due and owing and obtains a judgment for \$450, he is entitled to costs under subdivision 5 of section 3228 of the Code of Civil Procedure, as amended by chapter 80 of the Laws of 1914.

It was the intention of the Legislature by the amendment of 1914 to subdivision 5 of section 3228 of the Code of Civil Procedure to make the right to tax costs in an action brought in the Supreme Court in Bronx county where the recovery was for \$50 or more, but less than \$500, depend upon whether or not the action might have been brought in the County Court of Bronx county.

When the Legislature made the right to tax costs depend upon whether the action might have been brought in the County Court, it necessarily repealed by implication any statutory provision making such right depend on whether the action might have been brought in the City Court, and intended that if the action could not have been brought in the County Court, costs are recoverable. *Henning v. Camacho*, 856.

**COSTS — Continued.**

Special proceeding — stipulation — stenographer's and referee's fees.

See CORPORATIONS, 6.

Action for waste.

See WILL, 3.

Discretionary power of Surrogate's Court.

See WILL, 8.

**COURT.**

*Municipal corporations — city judge of Yonkers is city officer — vacancy in said office may be filled by appointment by mayor — city judge, although appointed, not elected, may remove probation officer — removal of veteran fireman from said office must be on charges and after hearing.* The city judge of the city of Yonkers is a city, not a State officer, and the mayor of said city, not the Governor of the State, has the power to fill a vacancy in said office by appointment.

A city judge of the city of Yonkers, although appointed to fill a vacancy and not elected by the people, has power to appoint probation officers.

But where a veteran volunteer fireman has been appointed to the position of chief probation officer of the Court of Special Sessions in the city of Yonkers, as said position is classified in the competitive class by the municipal civil service commission with the approval of the mayor and of the State Civil Service Commission, said probation officer cannot be removed without charges and without a hearing at the pleasure of the city judge. *People ex rel. Garrity v. Walsh*, 118.

Authority of Court of Claims to hear claim of State employee.

See CONSTITUTIONAL LAW, 1.

Jurisdiction of Supreme Court over judgment of Municipal Court.

See DEBTOR AND CREDITOR.

**CRIME.**

1. *Violation of Penal Law, section 1142, in representing that drug or medicine can be used to procure abortion — evidence.* Upon the prosecution of a defendant, a physician, for the violation of section 1142 of the Penal Law, the witnesses for the People were detectives, members of the police force who acted as decoys. It appeared that the defendant gave a prescription to one of the witnesses and furnished her some pills, but the prescription was nothing more than a formula for nausea, and there was no proof that the pills in the dose recommended would be an abortifacient or that they purported to be "for causing unlawful abortion." Evidence examined, and held, insufficient to convict the defendant of selling or giving away a drug or medicine for causing unlawful abortion or purporting to be for causing unlawful abortion, but sufficient to justify a finding of his guilt in holding out representations that the drug or medicine "can be so used or applied, or any such description as will be calculated to lead another to so use or apply," etc.

The gravamen of the provision of the statute prohibiting the holding out of representation that a drug or medicine can be used to procure an abortion is not the character of the drug nor the purpose of him who proffers it, but the representation made. *People v. Hager*, 153.

2. *Extradition — habeas corpus — traverse of return — evidence — burden of proof — competency of evidence as to former conviction.* Upon a petition by a person charged with being a fugitive from justice for a writ of habeas corpus, the identity of the name of such person with the name of the person named in the rendition warrant raises a presumption that the persons are the same.

A traverse of the return to such a petition raises an issue of fact to be determined by the court as to the preponderance of the evidence with the burden upon the relator.

Evidence examined, and held, insufficient to overcome the presumptive *prima facie* case made out by the rendition warrant that the relator was the fugitive from justice sought.

Habeas corpus is not the proper proceeding to try the question of a relator's guilt or innocence of the crime charged, the proceeding being limited to the determination of whether the person held in custody is or is not a fugitive from justice as charged.

**CRIME** — *Continued.*

Evidence on such a proceeding as to a former conviction of the relator is competent for the purpose of establishing identity.

As such evidence could have had no prejudicial influence upon the court in determining the question as to whether or not the relator was a fugitive from justice, it is the duty of the appellate court to disregard it under section 542 of the Code of Criminal Procedure. *People ex rel. Teitelbaum v. Ryan*, 404.

3. *Assault — reversible error — admissibility of statements to district attorney by defendant induced by promise that they would not be used against him on the trial.* Upon the prosecution of a defendant for an alleged assault with a loaded pistol, it is reversible error to permit his examination by the prosecuting attorney over his objection and exception as to prior statements made by him in answer to questions by said attorney after being assured by the prison chaplain that anything he said would not be used against him, where such statements materially contradicted his testimony as given on the trial, and tend directly to connect him with the crime. *People v. Reilly*, 522.

4. *Public nuisance — indictment for maintaining a disorderly house — when evidence justifies a conviction — instructions to employees as to reporting improper use of premises properly excluded — duty of trial judge to avoid creation of prejudice in favor of defendants — invading province of jury — mistrial — when refusal to accept is waiver of right to new trial.* Upon the trial of an indictment for maintaining a public nuisance, to wit, a disorderly house, testimony that an apartment house leased by one of the defendants, some of the apartments being leased by his codefendant, was openly frequented by prostitutes, who with their companions quarreled, used improper language and made indecent exposures before uncurtained windows, all of which both defendants had knowledge and willfully permitted the house to be so maintained, justifies a conviction of the crime charged.

Where upon the trial the sole questions were the actual use to which the house was put, and the actual knowledge thereof of defendants, evidence as to instructions given to the janitor, elevatorman and hallman, to report any improper use of the apartments, was properly excluded.

Permitting a witness to designate the action of one of the defendants in tacking a paper upon the door of one of the apartments as a "cover," the only inference which was within the province of the jury, could not be considered prejudicial to the defendant.

It is the duty of a trial judge to so conduct a criminal trial as to avoid if possible the creation of any undue prejudice in favor of the defendants, as against policemen, the necessary witnesses for the prosecution.

The province of the jury was invaded where the trial judge asked more than twelve hundred questions indicating his bias, both sides being represented by able counsel.

But where the court admonished a juror for misconduct and at once offered counsel for the defendant a mistrial, the refusal thereof constitutes a waiver of the right to a new trial though sought on other and different grounds. *People v. Shenk*, 753.

5. *Commutation — compensation and paroles — chapter 358 of the Laws of 1916 — questions relating to construction of said statute not determined on mandamus granted to discharge convict — academic question — rights of convicts similarly situated will not be determined — deductions from term of sentence cannot be earned by convict on parole.* The court on a writ of mandamus granted on the relation of a person convicted of crime will not determine whether the so-called Compensation Act (Laws of 1916, chap. 358) allowing a convict certain deductions from his time of imprisonment for efficient and willing performance of duties assigned to him is retroactive if it appears that the relator has actually been released from confinement so that he is without any actual grievance.

Moreover, the court will not direct the Superintendent of State Prisons and others to meet to parole all convicts entitled to parole under said statute on a petition for mandamus made by a single convict for the redress of his own grievance and those of other convicts similarly situated.

It seems, that under said statute a convict is not entitled to compensation by deduction from his time of imprisonment during the period he is on

**CRIME — Continued.**

parole, for during such period there can be no efficient and willing performance of duties assigned to him within the meaning of the statute.

The court will not suggest how the prison authorities should make up a table so as to allow to a convict the number of days' deduction he has earned by willing performance of duties.

Apparent contradictions in said statute relating to the question as to whether it is retroactive should be corrected by the Legislature. *People ex rel. Roache v. Carter*, 833.

Improper address by district attorney to jury.

See TRIAL, 4.

[For tables containing all sections of the Code of Criminal Procedure and of the Penal Law cited and construed in this volume, see *ante*, pp. lxxxiv and lxxxv.]

**DAMAGES.**

Improper entry by innkeeper into guest's room — physical suffering.

See INNKEEPER, 1.

Refusal of bank to honor check — measure of damages.

See BILLS AND NOTES, 1.

**DEBTOR AND CREDITOR.**

*Supplementary proceedings — jurisdiction of justice of Supreme Court to make order for examination of judgment debtor — enforcement of judgment of Municipal Court.* When a judgment recovered in the borough of Brooklyn in the Municipal Court of the City of New York is docketed with the county clerk of Kings county, it is deemed a judgment of the Supreme Court and may be enforced accordingly, and a justice of the Supreme Court has jurisdiction to make an order for the examination of the judgment debtor in proceedings supplementary to execution. *Matter of Strep*, 869.

See BANKING.

**DECEDENT'S ESTATE.**

1. *Executors of deceased executor — right to an accounting and relief from custody of unadministered estate — practice — administrator with will annexed should be appointed — executors of executor cannot be burdened with distribution of estate.* The executors of a deceased executor are entitled to a judicial approval of the accounts of their testator and to relief from the custody of property left unadministered by him. Of such property they are merely custodians without the executorial powers which appertained to their testator.

Such executors of a deceased executor have no power to collect or distribute the prior estate which power should be vested in an administrator with the will annexed.

Although the deceased executor was judicially directed to make certain distributions to creditors, the decree is not binding upon the executors of the deceased executor to the extent of burdening them with the duty of making such distribution and it is doubtful whether they would have power to do so.

Where there is no administrator with the will annexed, the proper way to provide for the distribution of unadministered assets among the creditors of a brother of the testatrix is to order the assets turned over to the receiver of the estate of said brother, who should realize on them and make proper distribution. *Matter of Duncan*, 91.

2. *Gift inter vivos — evidence — delivery of bank books to third person for donee.* The uncontradicted evidence of a third person that a decedent about a month prior to his death stated to him that he had money in a bank and if anything happened to him he wanted his daughter Mrs. Ryan to have it; that his other daughter had once accused him; that thereafter said decedent delivered the bank books representing the money to said third person, saying, "I want Mrs. Ryan to have it," and never asked for the books again, although he thereafter saw said third person several times, the last time the day before his death, is sufficient to establish a valid gift *inter vivos*.

The fact that the decedent might have delivered the bank books to his daughter personally, in the presence of a witness, does not tend to impeach the transaction. *Matter of Cummings*, 286.

**DECEDENT'S ESTATE** — *Continued.*

3. *Real property — right of life tenant to possession, control and management of estate.* A legatee to whom the net estate of a decedent has been bequeathed for and during her natural life, with remainder over upon her death, is entitled to the possession, control and management of the estate, upon giving proper and adequate security for the payment and delivery of the corpus of the estate to the remaindermen upon her death.

Hence, where a testatrix left the remainder of her estate, both real and personal, to her sister for life, with remainder to her nephews and nieces, the sister has the absolute right, upon tender of adequate and proper security, to have the net estate paid over to her. *Matter of Colwell, 408.*

4. *Right to reasonable time within which to convert assets into cash — provision of will directing sale of assets construed.* The general rule in cases of administration is that an executor or administrator is entitled to take a reasonable time within which to convert the assets of an estate into cash, and what is a reasonable time depends in each case upon the circumstances. If such executor or administrator acts in good faith and exercises his best judgment he will not ordinarily be held personally responsible when it appears in the light of after events that he would have displayed better judgment or have produced a more favorable result if he had sold earlier.

Notwithstanding the use in a will of the following words, "I do order and direct my executor hereinafter named, as soon as may be after my decease," to sell and convert into money all the real and personal estate, the discretion of the executor as to the time for selling securities remained unfettered, provided he acted in good faith, without neglect and in the honest exercise of his best judgment, and his accounts should not be surcharged with a shrinkage claimed to have resulted from a delay in selling securities. *Matter of Varet, 446.*

5. *Right of temporary administrator who is also an attorney at law to compensation for legal services — such administrator not entitled to commissions calculated upon fee value of real estate — Code Civil Procedure, section 2753, as amended, construed.* Under section 2753 of the Code of Civil Procedure, as amended by chapter 596 of the Laws of 1916, providing that on the settlement of the account of any executor or administrator if he be an attorney and counselor at law and shall have rendered legal services in connection with his official duties, the surrogate must allow him such compensation for his legal services as shall appear to be just and reasonable, a temporary administrator who is an attorney and counselor at law is entitled to an allowance for his legal services rendered to the estate.

A temporary administrator is not entitled to commissions upon the fee value of real estate placed in his possession for the purpose of receiving rents and profits. He cannot be said to have "received" said property within the meaning of section 2753 of the Code of Civil Procedure, as amended by chapter 596 of the Laws of 1916, which provides that "The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions." *Matter of Runk, 461.*

6. *Action upon an alleged written assignment by testator to plaintiff — parol evidence insufficient to establish said assignment.* Plaintiff alleged that the testator, a former life insurance agent, duly assigned and transferred to her by an instrument in writing all premiums due and to become due to him on certain insurance policies, but was unable to produce the writing and sought to prove the same by parol evidence. Evidence examined, and held, insufficient to establish a cause of action, and that the complaint should be dismissed. *Mason v. Bristol, 514.*

7. *Decedent's estate — testamentary trust — apportionment of stocks of corporations subsidiary to Standard Oil Company between capital and income — apportionment of dividends between capital and income — apportionment of rights to subscribe for stock — properties purchased by accumulated profits before and after creation of trust — increase in value of stock not income — test by which to determine whether allotment of profits to income will impair capital — time when trust was created — time of declaration of dividends controls allotment thereof.* Where a trustee under a will giving the income of the trust estate to life beneficiaries with remainders over at the

**DECEDENT'S ESTATE** — *Continued.*

expiration of the trust held stock of the Standard Oil Company of New Jersey and, when said company was judicially declared to be an illegal combination in restraint of trade, received from said combination on its dissolution the stocks of its constituent corporations, said stocks should be held as part of the *corpus* of the trust estate and should not be distributed to the life beneficiaries as income.

The above rule holds although the present value of the Standard Oil stock of New Jersey remaining in the trust estate after said distribution exceeds the value of all the stocks when the trust was created, for that fact affords no justification for disrupting the *corpus* of the trust.

In the apportionment of the stocks of the subsidiary companies between the *corpus* and income the *corpus* of the trust must be preserved for the benefit of the remaindermen.

In the case of an extraordinary dividend declared on stocks held as part of a trust estate it is the duty of the court to inquire what the sources are and to credit to capital account so much of the dividend as is derived from or constitutes a distribution of capital (including profits accrued before the creation of the trust) and to credit to the income account so much thereof as is derived from or constitutes a distribution of profits accruing during the lifetime of the trust.

Although the books of the corporation distributing the stocks of the constituent companies treat the distribution as one of reserved or accumulated profits, such statements are mere bookkeeping entries and do not affect the fact that the transaction was a redistribution of capital assets.

The capital of the Standard Oil Company of New Jersey was depleted by taking therefrom the assets of its subsidiary companies although after such deduction the book value of the oil company's shares was larger than when the testamentary trust was created.

Stocks of the subsidiary companies which at the time of the creation of the trust and prior to the testator's death were owned by the Standard Oil Company of New Jersey were properly apportioned to the capital of the trust estate, for the testator's ownership of a share of all of the assets of the Standard Oil Company of New Jersey carried with it a similar interest in the stock of the subsidiary companies and such interest cannot be severed and allotted to income without impairing the integrity of the *corpus* of the trust.

Where a subsidiary oil company whose stock was held by the Standard Oil Company of New Jersey prior to the creation of the trust, owned the stock of other subsidiary companies which it had purchased out of surplus earnings after the formation of the trust, the stock of said subsidiary companies which were distributed on the disintegration of the Standard Oil Company of New Jersey should be allotted to the capital of the trust.

But stock of subsidiary companies purchased by the Standard Oil Company of New Jersey with earnings accumulated after the formation of the trust should be allotted to the life beneficiaries, as it involves no impairment of the original *corpus* of the trust.

In determining whether a distribution of stocks acquired out of and representing surplus earnings after the formation of the trust, the basic inquiry is whether a distribution thereof to the life tenants would intrench upon the *corpus* of the original trust.

Distribution of extraordinary dividends made by subsidiary companies and by the Standard Oil Company of New Jersey after the disintegration of said company should be allotted to the life beneficiaries as well as dividends declared but not yet paid.

But the right of the trustee to subscribe for additional stock of the subsidiary companies at par should be allotted to the principal of the trust for the life tenants are not entitled to said subscription rights.

So, too, similar subscription rights should be allotted to the capital of the trust although the corporations offering said rights declared at the same time a cash dividend and authorized subscribers to apply the same in payment for additional stock.

Rights to subscribe for stock at par offered to stockholders by constituent companies should not be treated as an extraordinary dividend and allotted to the income of the trust estate, for such subscription rights belong to the capital, otherwise the trustee's proportion of interest in the assets of the companies would be materially altered for the worse.

**DECEDENT'S ESTATE** — *Continued.*

Where subsidiary oil companies whose stock was part of the trust estate formerly owned pipe lines and, in order to escape regulation by the Interstate Commerce Commission, had the pipe lines separately incorporated and took back the stock of said companies in return for the pipe line properties, and the stocks were then distributed among stockholders *pro rata*, said distribution was not a dividend to be allotted to life beneficiaries, but on the contrary was part of the original *corpus* of the trust.

In making calculations necessary for the apportionment of the dividends declared by the former subsidiary companies of the Standard Oil Company of New Jersey there are two dates to be determined: *First*, the date of the creation or establishment of the trust, and *second*, the date to be taken for the purpose of ascertaining whether the capital of the trust will be impaired by extraordinary dividends declared. The former date is not the date of the testator's death but the date when the trustee received the securities from the executrix. The second date is not that of the time of the distribution of the dividend but, on the contrary, is the date when the dividend was declared. *United States Trust Co. v. Heys*, 544.

8. *When allowances by Supreme Court from estate of lunatic to remote next of kin constitute gifts and not advancements — such allowances not chargeable against subsequent interests of recipients in the estate — authority of court of equity to make advancements from estate of lunatic for benefit of next of kin — authority of Surrogate's Court to modify orders of Supreme Court — doctrine of hotchpot or collatio bonorum.* Allowances made to remote next of kin, brothers and sisters of the half blood and children of deceased sisters of the whole blood and sisters of the half blood, who were apparently not entitled to share in the estate, for their maintenance and support, from the estate of a testator who has been judicially declared incompetent under orders of the Supreme Court in which orders there was no provision charging the recipients with the amounts received in case they subsequently succeeded to an interest in the estate, are not advancements, but are gifts during the lifetime of the testator, and hence the court has no power to decree that they shall be surrendered or accounted for as a condition of taking an interest in the testator's estate which is fixed by the Decedent Estate Law.

The Supreme Court, in authorizing such allowances, acts as a court of equity, having custody and control of the estate of the incompetent; it acts for the incompetent in reference to his estate as it supposes the incompetent would have acted if he had been of sound mind.

A court of equity may legally allow payments out of a lunatic's surplus income to persons not entitled to any interest in his estate.

Orders of the Supreme Court, making gifts from the estate of a lunatic to remote next of kin for their maintenance and support, being valid, plain and unambiguous, the Surrogate's Court is without authority to write and incorporate into them a provision contradicting their terms and wholly unnecessary. This is so whether or not the doctrine of hotchpot or the similar doctrine of *collatio bonorum* obtains in this State.

The doctrine of hotchpot or the similar doctrine of *collatio bonorum* is based upon the fact that there must have been an intention of an intestate that there should be equality in inheritance among his children. *Matter of Farmers' Loan & Trust Co.*, 642.

Executors of deceased director not liable for subsequent acts of board.  
*See CORPORATION*, 1.

When husband's estate not liable to wife's brother-in-law for her support.  
*See HUSBAND AND WIFE*, 2.

Proceeds of action for death — attorney's compensation.  
*See NEGLIGENCE*, 4.

Opening default of contestants on probate.  
*See SURROGATE*.

Transfer tax — foreign bank stock owned by deceased non-resident.  
*See TAX*, 1.

Rights of adopted child.  
*See WORKMEN'S COMPENSATION LAW*, 5.  
*See TRUST*.  
*See WILL*.

**DEED.***See* REAL PROPERTY.**DEPOSITION.**

*Examination of defendants before trial — suit to impress trust and for accounting — plaintiffs must establish right to accounting before examination of defendants as to income received from securities — securities as to which examination is required must be specified — practice — order for examination should not refer to moving papers. Plaintiffs suing defendants for a decree declaring that they hold certain stock as trustees for the plaintiffs and for an accounting thereof, are not entitled to an examination of the defendants before trial as to the dividends and income of the stock until they have established their right to an accounting.*

In any event the examination of the defendants before trial should be limited to specified stocks and securities, and an order which permits an unlimited and roving examination concerning any of the securities dealt in by the defendants is improper.

Where the plaintiffs contend that the stocks and securities were stolen from them and delivered to the defendants they should specify in their moving papers what specific stocks and securities were stolen.

It is improper for the court to order an examination of the defendants concerning matters referred to in specified folios of the affidavit upon which the order is made, when the folios in the original and printed papers are different, so that it is impossible to ascertain from the papers on appeal the matters to which the examination is limited.

The practice of framing orders for examination before trial so that they read "concerning the matters set forth in the annexed affidavit," or "concerning the issues in this action," is improper. *Bamberger v. Cooke*, 805.

**DISBARMENT.***See* ATTORNEY AND CLIENT, 1, 3.**DISCOVERY.**

*Books and papers in foreign State in custody of trustee in bankruptcy — when production of papers in this State should not be required — practice — open commission. Where the books and papers of a bankrupt defendant are in the possession of the trustee in bankruptcy appointed by the Federal court in another State, the courts of this State should not order the trustee to bring the books and papers into this State and deposit them with the county clerk to be inspected by the plaintiff, irrespective of any jurisdiction of the court to make such order.*

The proper remedy of the plaintiff is an open commission to examine the trustee in the foreign State and have the books and papers produced and proved, and in case there should be an objection to the originals being returned here with the commission, to have copies annexed as provided by subdivision 3 of section 901 of the Code of Civil Procedure. *Jaffe v. Weld*, 16.

**DIVORCE.**

Validity of foreign divorce.

*See* HUSBAND AND WIFE, 1.

Validity of foreign decree.

*See* HUSBAND AND WIFE, 3.**DOMESTIC RELATIONS.***See* HUSBAND AND WIFE.**DOWER.**When widow estopped as against *bona fide* purchasers.*See* REAL PROPERTY, 4.**EASEMENT.**

Methods of acquisition — easement of necessity — prescription — adverse user.

*See* REAL PROPERTY, 3.

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**EJECTMENT.**

*Possession — limitation of action — pleading — defense of statute taken by defendant subsequently served.* In an action of ejectment the possession of the defendant may be both a question of fact and of law.

In an action of ejectment a defendant owning the fee, who was brought into the action by the service of an amended summons and complaint after other defendants had been served, may plead the Statute of Limitations by alleging the lapse of twenty years "before the commencement of this action," although she does not assert the statute "as to this defendant."

Such defendant was not affected by the prior service on others not united in interest with her. *Good v. Brown*, 808.

Parties — tenants in common. *People v. Payne*, 899.

**ELECTION.**

Election of remedies — lease subordinate to mortgage.

See MORTGAGE, 2.

Release of commissions earned in consideration of new contract — breach of second contract — election of remedies.

See PRINCIPAL AND AGENT, 1.

Right to hold as principal agent who misrepresents his authority.

See PRINCIPAL AND AGENT, 5.

Agreement as between life tenant and remainderman.

See TRUST, 2.

Death caused by person not employer — election of remedies.

See WORKMEN'S COMPENSATION LAW, 1.

**ELECTION LAW.**

1. *Mandamus — correction of return of canvass of soldier votes.* Where local inspectors, not provided with tally sheets as required by section 334 of the Election Law, as amended, after they had canvassed soldier votes, returned the result, a candidate for mayor upon affidavit that he had been informed by an inspector and a watcher that the true results of the count had been transposed by the inspectors, is not entitled to a writ of mandamus to correct the return, as the court has no power in such proceeding to open the ballot box and direct a recanvass of the votes so cast.

But clerical errors on the return or made apparent by not agreeing with the tally sheet may be thus corrected.

The Election Law, section 520, does not take away the safeguards for the correction of errors, but merely declares that soldiers' and sailors' elections may be contested like other elections by citizen voters. *People ex rel. Fiske v. Bantz*, 702.

2. *Mandamus to compel inspectors of election to correct return as to soldier votes — intention of voter.* Where a soldier ballot marked "Dr. Brush" had not been protested, and the inspectors of election had credited the vote to Edward F. Brush because such intention of the voter was clearly apparent, a writ of mandamus will not lie to compel the inspectors of election to correct their return. *People ex rel. Fiske v. Anderson*, 705.

3. *Canvass of soldier ballots — intent — constitutional law.* Under section 514 of the Election Law, as amended by chapter 815 of the Laws of 1917, relating to the canvass of soldiers' votes, providing "that no ballot shall be rejected as void where the intent of the voter is clearly apparent," the determination of the question of intent is one of fact, and the power to pass thereon is lodged with the inspectors of election.

Where, in an election conducted at a military camp, one ballot was voted for mayor in the blank space for city chamberlain and another in the space for superintendent of the poor, and it appears that there was no vacancy to be filled for the office of superintendent of the poor, and that the city had no such office as city chamberlain, the local inspectors of election were justified in finding that such ballots were valid and could be counted for mayor.

The intent of the voter should be gathered from the face of the ballot itself, and the local inspectors cannot be governed by extrinsic evidence or by affidavits.

A ballot on which the voter had twice written his name and address, stating that he voted "the straight Democratic ticket" was also properly

**ELECTION LAW — Continued.**

counted. Such ballot is not in contravention of the Constitution because so marked.

Section 1 of article 2 of the Constitution, securing the vote to soldiers and sailors in actual service, does away with objections which might otherwise render the ballots in question void. *Matter of Fiske*, 706.

4. *Challenge as to capacity of voters does not constitute a protest or render their ballots "protested."* A paper filed by a duly appointed challenger for a political party merely questioning the capacity of certain persons in the military service to vote and not relating to the form or marking of any of their ballots, constitutes a challenge and not a protest, and was properly overruled by the inspectors of election.

The ballots of such voters when subsequently counted were not "protested" and, therefore, the inspectors cannot be ordered to place such ballots among "protested, void and wholly blank ballots." *People ex rel. Fiske v. Bantz*, No. 2, 712.

5. *Inspectors' finding as to validity of ballots of soldiers controlling.* Under section 514 of the Election Law, as amended, the inspectors' finding that soldiers intended to vote for Edward F. Brush should be controlling although the ballots were marked "Dr. Brush," "Brush" and "Mr. Brush." *People ex rel. Fiske v. Anderson*, No. 2, 716.

6. *Soldier ballots — mandamus to correct return.* Where a ballot was marked with the word "Fiske" and the inspectors failed to find the voter's intent to be for the relator Edwin W. Fiske and there was no protest in regard to said ballot, the court, on application for a writ of mandamus to correct the return, has no authority to count said vote for the relator.

A subsequent assertion that all the soldier ballots had been "protested" because of a certain challenge or objection, did not authorize an order for a recount and recanvass. *People ex rel. Fiske v. Schum*, 717.

Commissioner of elections in Niagara county.

See CONSTITUTIONAL LAW, 3.

**EMINENT DOMAIN.**

Encroachment upon street by public bath — compensation to abutting owners.

See NEW YORK CITY, 4.

**EQUITY.**

*Trial — when question of fact arises — suit for reformation of lease upon ground of mistake — presumption from reading written lease in evidence — burden of proof — admission against interest — verdict against weight of evidence.* When one reasonable mind can infer from all the evidence that a controlling fact was proved, while another reasonable mind can infer that it was not proved, a question is presented for the jury.

A question of fact arises if conflicting inferences may be drawn from uncontradicted evidence.

Where, in a suit by the assignee of a lessee for the reformation of a written lease, upon the ground of mistake, the reading of the lease in evidence created a presumption against the defendant, and cast the burden upon him, the fact that there was no witness whose testimony was contradictory or contrary to the testimony of witnesses called by the defendant, did not put it in the category of one whose case is not opposed to direct evidence.

Since the original lessee had assigned the lease to the plaintiff and apparently was not interested in the event of the suit, the testimony adduced from her and her agents was not in effect an admission against interest.

The question whether the parties to the original lease both intended that the words "disposes of" should be "is dispossessed" or "be dispossessed" was submitted to the jury. *Held*, that a verdict founded on a finding against the theory of mistake was against the weight of the evidence. *Schall v. Schwartz & Co., Inc.*, 397.

Enjoining maintenance of sewer — effect of prior judgment in action for injuries caused by sewer.

See JUDGMENT.

Complaint in suit to annul adoption.

See PARENT AND CHILD.

**EQUITY — Continued.**

Specific performance of contract to give lease.

See REAL PROPERTY, 2.

Jurisdiction to restrain trespass.

See TRESPASS.

Suit to reform contract to exchange properties and for specific performance.

See VENDOR AND PURCHASER.

**ESTOPPEL.**

Use of streets for electric wires — permission without franchise.

See CORPORATIONS, 5.

Presentation of check through clearing house — when no acceptance — custom.

See BILLS AND NOTES, 2.

Action for malicious prosecution — probable cause.

See MALICIOUS PROSECUTION, 4.

Failure to object to unlawful act.

See REAL PROPERTY, 3.

When widow estopped from claiming dower as against *bona fide* purchasers.

See REAL PROPERTY, 4.

**EVIDENCE.**

Assault — admissibility of statements to district attorney by defendant induced by promise that they would not be used on trial.

See CRIME, 3.

Action to recover premiums on policy of liability insurance.

See INSURANCE, 2.

Presumption that written instrument contains all of agreement.

See MASTER AND SERVANT, 4.

Injury caused by defective stair — condition of step after accident.

See NEGLIGENCE, 8.

Testimony of admitted perjurers.

See PARTNERSHIP, 3.

Admissibility of parol evidence to explain written contract.

See PLEADING, 5.

Admissions — copy of judgment roll in prior action.

See TRIAL, 3.

**EXTRADITION.**

Habeas corpus — traverse in return — burden of proof.

See CRIME, 2.

Indictment in foreign State.

See HABEAS CORPUS.

**FALSE IMPRISONMENT.**

1. *Malicious prosecution* — request by defendant for general verdict rather than findings on separate causes — evidence not justifying finding of want of probable cause — erroneous charge as to right of officers to arrest without warrant. Where in an action uniting causes for false imprisonment and malicious prosecution the court directed the jury to make separate findings as to each cause of action, but, after the defendant's objection, the court acceded to his request for a general verdict which was rendered for the plaintiff, the judgment will be affirmed on appeal if there is evidence to sustain a verdict on either cause of action, for any confusion existing was caused by the defendant himself.

It appeared that an electric motor owned by the defendant disappeared from his place of business, and he, having been informed as to its whereabouts, called at the plaintiff's store with two police officers where the motor was identified as that belonging to the defendant by comparing its number with that on the original bill of sale. The plaintiff claimed that he bought it at an auction at a place he could not remember, which statement was afterwards proven to be false when he was taken to the police station by the officers, apparently on their own responsibility. On all the

**FALSE IMPRISONMENT** — *Continued.*

evidence, *held*, that a finding by the jury that the defendant acted without probable cause in bringing about the arrest of the plaintiff was against the weight of evidence, even if it be assumed that the defendant did instigate the arrest, and hence the cause of action for malicious prosecution was not established.

Moreover, the judgment based on false arrest and imprisonment cannot stand where the court erroneously instructed the jury that the offense charged against the plaintiff was a misdemeanor so that the arrest could not be made without warrant, when as a matter of fact the plaintiff was charged with knowingly receiving stolen property which is a felony and would justify an arrest without warrant. *Zucker v. Zarembowitz*, 288.

2. *Arrest of woman in city of New York without warrant on charge of solicitation* — defendant must show that plaintiff was guilty and that offense was committed in his presence — judgment for plaintiff affirmed. Where a police officer arrested a woman in the city of New York without judicial warrant for an alleged violation of section 1458 of the Consolidation Act (Laws of 1882, chap. 410), which makes solicitation on a public thoroughfare disorderly conduct tending to a breach of the peace, he must, in order to escape liability when subsequently sued for false imprisonment after the discharge of the plaintiff, establish, *first*, that the plaintiff was guilty of the offense, and *second*, that the offense was committed in his presence or within his view.

Evidence examined, and *held*, that the jury were justified in finding that the plaintiff was unlawfully imprisoned and detained and that a judgment in her favor should be affirmed. *Lauffer v. Downes*, 327.

Complaint — arrest without warrant.

See ASSAULT.

**FRAUD.**

Transfer of property procured by undue influence.

See ASSIGNMENT.

Promissory note as memorandum of promise to pay debt discharged in bankruptcy.

See BILLS AND NOTES, 3.

Parol agreement extending time to pay mortgage.

See CONTRACT, 5.

Overvaluation in insurance policy.

See INSURANCE, 1.

Suit to recover moneys for improving property on faith of liquor tax certificate having forged consents.

See INTOXICATING LIQUORS, 2.

Insufficient complaint — failure to allege damage.

See PLEADING, 6.

Oral contract for sale of merchandise — Statute of Frauds.

See SALE, 2.

Statute of Frauds — memorandum in writing — acceptance by parol.

See SALE, 4.

Action for balance due for goods sold — fraudulent misrepresentation by seller.

See SALE, 6.

**FORECLOSURE.**

See MORTGAGE.

**GAS AND ELECTRICITY.**

Authority of city to regulate use of gas company's franchise.

See NEW YORK CITY, 2.

**GIFT.**

Delivery of bank books to third person.

See DECEDENT'S ESTATE, 2.

**GUARDIAN AND WARD.**

Trustees — powers of Supreme Court. *Matter of Weed*, 921.

**HABEAS CORPUS.**

*Extradition — indictment in foreign State for crime of false pretenses — immaterial that defendant did not remain until consummation of crime — indictment and merits of defense not considered.* A person is properly committed for extradition to another State and his writ of habeas corpus should be dismissed where it appears that he was present in the foreign State at the time he made alleged false representations for which he was indicted, even though he did not remain in the foreign jurisdiction until the consummation of the crime.

The court on such writ of habeas corpus will not go into the sufficiency of the indictment or the merits of the defense which are matters for the foreign court. *People ex rel. Goldfarb v. Gargan*, 410.

Extradition — traverse in return — burden of proof.

*See CRIME*, 2.

**HIGHWAYS.**

*Alteration — acceptance — dedication — abandonment of portion of highway — ownership of title — vendor and purchaser — deed — breach of condition subsequent — re-entry.* Where a town for the purpose of straightening a highway shifted it to one side at the instance and expense of the owner of the abutting land, the owner will be deemed to have dedicated and the town to have accepted the additional land, although there was no conveyance.

Upon the abandonment of the portion of the road, title thereto did not revert to the grantor to the town, who had conveyed "for the purpose of said road," nor did it pass to the abutting owners, but as it was not conveyed by the town the title remained in it and has passed to its successor, the city of New York, which in justice should grant releases to the owners of the several lots abutting thereon.

A buyer of one of said lots should not be obliged to accept the conveyance without a release from the city.

If the grant were on condition subsequent, the title of the city, the successor of the town, could be defeated only by re-entry.

A right to re-enter for a breach of condition subsequent is not an estate. *Huber v. Gorg*, 369.

Highway Law not applicable to street railroad.

*See NEGLIGENCE*, 7.

Damages caused by change of grade of street — review of award.

*See NEW YORK CITY*, 3.

Maintenance of road by railroad.

*See RAILROAD*, 1.

**HUSBAND AND WIFE.**

1. *Action to annul marriage upon ground that wife had husband living — defense — validity of divorce procured in another State without personal service of process upon or appearance of defendant.* The courts of the State of the last matrimonial domicile can grant a decree of divorce without personal service of process upon or the appearance of the defendant therein, where the constructive service of process is made in accordance with the laws of that State, and such a decree is entitled to full faith and credit in the courts of all the States of the Union.

Hence, where in an action to annul a marriage between the plaintiff and defendant, on the ground that the defendant at the time the marriage was solemnized had a husband living, it appears that the plaintiff and defendant were married in South Carolina; that prior thereto the defendant had procured a divorce from her former husband in the State of Alabama, their last matrimonial domicile; that the defendant, who was then a resident of the State of Mississippi, was not personally served and did not appear, but was served by publication and by mail, a judgment in favor of the plaintiff should be reversed. *Schenker v. Schenker*, 621.

**HUSBAND AND WIFE — Continued.**

2. *When estate of deceased husband not liable to brother-in-law of wife for her support during lifetime of husband and while living separate and apart from him — evidence.* In an action by the brother-in-law of the wife of a deceased husband to recover from his estate for board, lodging and wearing apparel which plaintiff furnished to his sister-in-law during the lifetime of the husband, it appeared that the sister-in-law after a separation from her husband lived with her mother for about twenty years and then went to live in the home of the plaintiff and remained there until the death of her husband; that during this period the husband resided within the same county to the knowledge of both the plaintiff and the wife; that no action was ever brought by her for separation or for support; that no demand was ever made either by her or by the plaintiff against the husband during his lifetime; that the husband had furnished the wife some money and had also cared for the daughter and that no attempt was made to prove any express agreement between the wife, as agent of her husband, and the plaintiff to pay for board, lodging and clothes. The court charged that if the jury believed that the plaintiff harbored his sister-in-law freely and gratuitously and without thought of looking to the husband for compensation therefor, he cannot recover.

*Held*, that a verdict in favor of the plaintiff is contrary to the law as charged, and against the evidence, and that the judgment thereon must be reversed and the complaint dismissed. *Simons v. Terhune*, 669.

3. *Divorce — validity in this State of foreign decree of divorce — annulment of marriage.* A decree of divorce granted by a Missouri court to the husband against the wife who was a resident of this State, will not be recognized as valid by our courts, where the first and only matrimonial domicile was in this State where the parties both resided at the time of their marriage, and the defendant did not subject herself to the jurisdiction of the Missouri court by appearing or answering in the action.

Hence, such a decree of divorce is no defense in an action to secure the annulment of a second marriage contracted by the defendant therein upon the ground that she had a former husband still living. *Gilson v. Airy*, 761.

**INCOMPETENT PERSON.**

When Supreme Court can make allowances from estate of lunatic by way of gift.

*See DECEDENT'S ESTATE*, 8.

**INJUNCTION.**

*Suit to enjoin use of trade name by corporation — sale of business and good will to corporation — proof not justifying injunction.* Suit to enjoin the defendant corporation from using the name "A. Ratkowsky, Inc.," unless the letters "Inc." be printed in letters of the same size and legibility as the preceding words. It appeared that the plaintiff had conducted a business in his own name and transferred the same, together with the good will and assets, to a corporation of the same name formed by him, and, after the corporation had become financially involved and his brother had lent financial aid, the plaintiff sold his stock in the corporation to his brother and agreed not to engage in a similar business within a certain district in the city of New York. Immediately after severing his connection with the corporation the plaintiff established himself in the same business one block beyond the prohibited zone and thereafter brought the present suit for an injunction. Evidence examined, and *held*, that the course of the plaintiff does not commend itself to a court of equity and that a temporary injunction should be vacated. *Ratkowsky v. Ratkowsky, Inc.*, 794.

Encroachment of street by public bath — when removal not compelled by injunction.

*See NEW YORK CITY*, 4.

Jurisdiction of equity to restrain trespass.

*See TRESPASS*.

Temporary structures in New York bay.

*See WATER AND WATERCOURSES*, 1.

**INNKEEPER.**

1. *Right to enforce rules to prevent immorality or other misconduct by guests — action based on improper entrance by servant into guest's room — damages — physical suffering included in compensatory damages — evidence — letter by managers of defendant to plaintiff's husband — verdict not excessive.* An innkeeper has the right to make and enforce proper rules to prevent immorality or any other form of misconduct tending to injure the reputation of his house, and has the right of access to the room of a guest under reasonable and proper circumstances and at proper times.

But such rule has no application and does not furnish a defense to a cause of action by a guest for damages resulting from the entrance to her room of a hotel detective, where the defendant had notice that the plaintiff and the man who accompanied her to the hotel and to the room assigned her were husband and wife, and also that she was an invalid requiring treatment at times, which had to be given her by her husband, and that a room was given her for the express purpose of permitting her husband to visit her therein, and that he was informed that he might do so.

In such an action physical consequences, including pain which was the direct result and consequence of the breach of duty owing a guest by an innkeeper, are included in and may be recovered as compensatory damages.

A letter written by the managers of the defendant to the plaintiff's husband expressing regret at the offense, was within the scope of their authority and the letter was competent evidence.

Evidence examined, and *held*, that a verdict of \$8,000 is not excessive. *Boyce v. Greeley Square Hotel Co.*, 61.

2. *Landlord and tenant — facts not establishing relation of innkeeper and guest so as to render former liable as such for property stolen.* Where the plaintiff leased four rooms in a hotel from the defendant for a period of six months to be occupied solely as private living rooms and said rooms were so used, the relation between the parties was that of landlord and tenant, and not innkeeper and guest, and, hence, the plaintiff is not entitled to enforce the innkeeper's liability against the defendant and recover for certain tennis trophies stolen from his room during his absence by some person unknown either to him or the defendant.

An innkeeper's liability exists only in the case of one who is a traveler and seeks the hospitality of the inn as a transient guest. *Hackett v. Bell Operating Co., Inc.*, 535.

**INSURANCE.**

1. *Action on policy of automobile insurance — effect of proof of actual value upon right to urge upon appeal valuation stated in policy — fraud — overvaluation — evidence by photographic enlargements as to change in consideration in prior bill of sale.* Where, in a policy of automobile insurance, the plaintiff's car was "valued at the sum insured," but the plaintiff alleged and sought to prove the actual value of the car by evidence of what it cost him, and also of what it cost his vendor, he cannot on appeal urge that the valuation stated in the policy is controlling.

A general verdict for the defendant in such a case imports not merely a failure to establish the value claimed, but may be taken as a finding that the car was insured at such an overvaluation as to amount to fraud avoiding the policy.

Plaintiff having introduced as an exhibit a prior bill of sale of the car to which he was not a party, evidence, by photographic enlargements showing that the consideration therein had been raised, was competent. *Hoffman v. Prussian National Insurance Co.*, 412.

2. *Evidence — action to recover premiums on policies of liability insurance — defense — evidence as to parol agreement of plaintiff to furnish insurance without expense inconsistent with subsequent contract between parties and in conflict with provisions of policies — trial — objections.* In an action to recover premiums on three policies of liability insurance issued by the plaintiff, *held*, that the verdict of the jury upon the issue, supported by parol evidence, as to whether or not the plaintiff agreed to furnish the insurance without expense to the insured was against the weight of the evidence and in direct conflict with the subsequent action of the insured in paying premiums on the policies.

**INSURANCE — Continued.**

Said alleged parol agreement was inconsistent with a subsequent written contract between the parties, which was intended to embrace all of the obligations of the plaintiff to the insured, incident to the latter taking the assignment of a construction contract which it is claimed on the part of the defendant constituted the consideration for the parol agreement with respect to the liability insurance; and so, a parol collateral agreement resting for its consideration on the written agreement could not be supported thereby.

Moreover, the parol evidence was in conflict with the express provisions of the policies which the insured received and retained, and although that precise objection was not taken to the evidence, it existed and could not have been overcome. *Massachusetts Bonding & Ins. Co. v. Thomson*, 425.

3. *Benevolent society — right of next of kin of decedent under by-laws to maintain action for death benefit.* A provision of the by-laws of a benevolent society that for the death of any effective member it would "pay to the widow, family or legal heirs, or to whom the member shall direct in his last will and testament or by a written declaration previously made," a certain sum, does not exclude the next of kin in case the insured left no widow or children from maintaining an action for a death benefit.

An action to recover for the death of a member of such a society may be maintained by the administrator of the decedent in behalf of the next of kin. *Pagliuca v. Italian Barbers' Benevolent Society*, 657.

4. *Indemnity — injury to employee operating a machine upon which it is forbidden by section 93 of the Labor Law that he shall work if under sixteen years of age — question of age for the jury.* Where a policy insuring plaintiff against loss from the liability imposed by law for damages for personal injuries suffered by any employee of the insured states that it does not cover loss or expense for injuries caused to or by any one employed by the insured contrary to law and in an action on the policy it appears that the employee who was injured was employed by plaintiff in operating a machine upon which it is forbidden, by section 93 of the Labor Law, that an infant under sixteen years of age shall be employed, the question of the employee's age is for the jury. *Wiemers, Inc., v. American Fidelity Co.*, 774.

5. *Credit insurance — when insurance company not bound by misrepresentations of sales agent — provisions of policy and rider construed.* An insurance company is not bound by the misrepresentations of a mere soliciting agent who had no authority or discretion as to the terms of policies to be issued, and acted merely as a messenger conveying propositions and counter propositions between the parties and reporting each step for instructions from his principal.

A policy of credit insurance provided that the insured should bear an initial loss of a certain percentage on total gross sales between February 9, 1914, and February 8, 1915, and had attached thereto a rider providing "that the insured shall bear the same percentage of initial loss on the gross sales, shipments and deliveries made between said two dates [September 10, 1913, and February 8, 1914], as the insured bears on shipments during the term of this policy." In an action for loss arising exclusively under the main policy, *held*, that the rider refers only to losses on sales and shipments made prior to the execution of the main policy, which was a renewal, and, therefore, the stated percentage on sales prior to said renewal should not be considered in determining the company's liability. *Knobel v. London Guarantee & Accident Co., Ltd.*, 870.

*Benevolent association — suspending member — injunction.* *Evans v. Supreme Council of Royal Arcanum*, 916.

**INTOXICATING LIQUORS.**

1. *Power of commissioners appointed to reduce number of places trafficking in liquors — when their determination not void so as to entitle State Commissioner to make new designation.* Under the provision of section 8 of the Liquor Tax Law, as amended by Laws of 1917, chapter 623, providing that where a town contains one or more villages, the commission shall reduce the number of places in each of such villages, and in the territory of such town outside of such villages "as nearly as may be" in proportion to the number of places where trafficking in liquors was engaged in at the time of investigation, the commission may take into consideration not only mathe-



**INTOXICATING LIQUORS** — *Continued.*

matics but their practical experience in business affairs, their acquaintance with commercial and social conditions of the town and the information as to the character of the places derived from the investigation.

Hence, where the commission has designated ten places in a village, but by applying a strict mathematical ratio said village would be entitled to only nine places, said designation is not void and does not entitle the State Commissioner of Excise to make a new designation.

There is nothing in the statute suggesting that the State Commissioner is given any power of supervision over the local commissions whose action the statute declares to "be final and conclusive." *Matter of Gagnat*, 193.

2. *Suit to recover moneys expended in improving saloon property on faith of liquor tax certificate having forged consents — erroneous direction of verdict for defendant — false representation as to validity of license.* In an action brought to recover losses sustained by the plaintiff who was induced to take a lease of premises for the purpose of selling liquors and who expended a considerable sum of money in equipping the premises for that purpose before discovering that the liquor license procured by the defendant brewing company was invalid because the consents thereto were forged, it was error for the court to direct a verdict for the defendant where the jury would have been justified in finding that the defendant, although at first ignorant of the forgery, allowed the plaintiff to continue the improvements and accept the license after the defendant's agent had discovered that the consents were forged.

A representation as to the validity of a liquor tax license, which is false, even if not known to be false, is equivalent to a representation known to be false, when it is made recklessly and in utter disregard of whether it is true or false. *Weisheit v. Pabst Brewing Co.* 275.

3. *Reduction of number of certificates issued in municipalities under 55,000 population — when determination of local commissioners conclusive — contrary determination by State Excise Commissioner.* Where two of the three commissioners appointed, under the authority of chapter 623 of the Laws of 1917, by the mayor of a city of a population less than 55,000 to reduce the number of liquor tax certificates so that there shall only be one certificate to each 500 of the population and to determine what persons are and what persons are not to be entitled to the issuance of certificates for the ensuing year, have filed a written determination of these questions, a person certified as being entitled to a certificate is entitled to the issuance thereof although the State Commissioner of Excise has made a different determination as to the persons entitled to certificates, upon the ground that the designations of the local commissioners were ineffective not being signed by the third commissioner, who made a dissenting and independent determination. Unanimity in a commission of three persons is not ordinarily required.

The determination of the local commissioners need not affirmatively show that a meeting was duly held upon reasonable notice to all members of the commission, for it is presumed that the local commission performed its statutory duty. *People ex rel. Glick v. Russell*, 322.

**JUDGMENT.**

*Recovery of damages for injuries caused by sewer — subsequent suit in equity to enjoin maintenance of sewer — municipal corporations — city of New York — when notice of intention to sue not necessary.* Where it was determined in an action at law, brought by landowners against a municipality, that the plaintiffs were entitled to substantial damages caused by a sewer illegally constructed or maintained, the judgment establishes the right of the plaintiffs to restrain the maintenance of the sewer system by a subsequent suit in equity.

In order to entitle the plaintiffs to maintain a suit for injunctive relief, or for damages, against the city of New York for the maintenance of the sewer it is not necessary to serve the defendant with notice of an intention to sue pursuant to section 261 of the city charter. *Murcott v. City of New York*, 171.

**JURY.**

Impartial jury necessary.

See NEGLIGENCE, 12.

**LANDLORD AND TENANT.**

*Action for rent — oral agreement of landlord to make improvements — erroneous charge.* Where a landlord sues to recover rent and the tenant defends on the ground that there was an oral agreement contemporaneous with the lease that it was not to take effect until the landlord had made certain improvements, it was error for the court to refuse to charge that if the repairs were to be made during the term of the lease the jury must not consider the evidence as to the oral agreement, there being proof which made the request to charge germane. *Roseff v. Beals*, 617.

Lease — reformation — mistake — burden of proof.

*See* EQUITY.

Facts not establishing relation of innkeeper and guest.

*See* INNKEEPER, 2.

Liability of landlord for death of sublessee by falling chimney.

*See* NEGLIGENCE, 11.

Specific performance of contract to give lease.

*See* REAL PROPERTY, 2.

Individual liability of trustee for negligence in making repairs in tenement house.

*See* TRUST, 1.

**LARCENY.**

Liability of landlord for goods stolen in family hotel.

*See* INNKEEPER, 2.

**LIBEL.**

Statement that contagious disease existed on plaintiff's premises — insufficient complaint.

*See* PLEADING, 3.

**LIENS.**

1. *Foreclosure of mechanic's lien by subcontractor — defense — willful and substantial non-performance by contractor — trial — reopening case — trial must follow pleadings.* Where in an action by a subcontractor who had supplied materials to the contractor, to foreclose a mechanic's lien, it appeared that the plaintiff also sued as assignee of the contractor, and that there had been a willful and substantial non-performance by the contractor, the complaint should be dismissed.

The court properly denied the plaintiff's application, made after the court had heard the case and had disposed of the findings and requests to find, to reopen the case so as to ask personal judgment upon notes advanced by the owner to the contractor which had not been paid.

A proceeding to foreclose mechanics' liens like other actions must follow the pleadings or at least the theory of the trial and the requests submitted. *Case & Son Mfg. Co. v. Young Improvement Corp.*, 740.

**LIMITATION OF ACTION.**

Ejectment — pleading.

*See* EJECTMENT.

Action for malpractice.

*See* PHYSICIAN.

Suspension during war.

*See* TRIAL, 1.

**LIQUOR TAX LAW.**

*See* INTOXICATING LIQUORS.

**MALICIOUS PROSECUTION.**

1. *Arrest and prosecution based upon information received from others — failure to show want of probable cause — when issue as to probable cause for court, not for jury.* When in an action for malicious prosecution it appears that the defendant caused the plaintiff's arrest on being informed by a trustworthy employee that the latter had actually seen the plaintiff take stolen goods from the defendant's premises and it is uncontradicted that the defendant entertained no malice toward the plaintiff, the complaint

**MALICIOUS PROSECUTION** — *Continued.*

should be dismissed, for the defendant, as a matter of law, had probable cause for the prosecution.

Where there is no dispute as to the facts the existence or non-existence of probable cause is for the court, not for the jury.

In the absence of some improper motive or malicious intent a person may secure the arrest and prosecution of another upon the statement of a trustworthy informant that he has knowledge of the guilt of the accused based upon personal knowledge strongly tending to establish guilt, which facts were communicated to the person causing the arrest by the one having personal knowledge thereof. *Day v. Levine*, 261.

2. *Prosecution for larceny — failure of plaintiff to show termination of criminal proceedings in his favor.* Action to recover damages for malicious prosecution based on the arrest of the plaintiff on a warrant charging him with larceny of certain samples of surgical instruments which he had in his possession as a salesman and which, it was contended, he failed to return upon demand. A friend of the plaintiff procured the withdrawal of the case against him by assuring the complainant that the instruments had been returned and that if any were lacking he would personally guarantee that they would be returned. As a matter of fact at the time of the arrest a portion of the instruments had not been returned. Evidence examined, and held, that a judgment for the plaintiff should be reversed because he had failed to establish by a preponderance of evidence that the criminal proceedings were terminated in his favor. *McNair v. Majgren*, 272.

3. *Reversible error — suggestions to jury and admission of evidence as to arrest of plaintiff on another charge for which defendant was not responsible — right of counsel to draw inferences from evidence.* Where, in an action for malicious prosecution based upon an arrest of the plaintiff for larceny, it appeared that at the time of the arrest he was already in custody upon a charge of having cocaine in his possession, upon which he was convicted, the larceny charge having been dropped, and there was no evidence that the defendant had anything to do with the investigation of the narcotic charge or with the arrest of the plaintiff thereon, it was reversible error for the plaintiff's counsel from the beginning of the case to the end to suggest to the jury that the defendant was responsible for the narcotic charge and to introduce evidence over objection of the circumstances attending the search of plaintiff's residence in aid of the narcotic charge, which evidence preceded the arrest of the plaintiff on the charge of larceny.

While counsel has a right to draw his own inferences from the evidence, a verdict cannot stand based even in part upon utterly improper and unwarranted inferences from irrelevant and improper evidence. *Wolff v. United Drug Co., Inc.*, 628.

4. *Defense — estoppel — probable cause.* Where in an action brought against C. and other defendants for malicious prosecution, it appears that the defendants all united to have plaintiff arrested for assault and battery on the defendant C., resulting in an indictment upon the trial of which the plaintiff herein was acquitted, and that thereafter the defendant C. sued the plaintiff for the same assault and battery, and it was decided that such assault had been committed, the judgment against the plaintiff herein for damages for assault is as to the defendant C. an estoppel, and the fact that the other defendants prompted and aided the defendant C. in prosecuting the plaintiff herein cannot involve them in damages as the validity of such act was established in the action between C. and the plaintiff, and hence they must have had probable cause. *Chernes v. Rosenwasser*, 837.

Complaint — arrest without warrant.

See ASSAULT.

Request by defendant for general verdict — probable cause.

See FALSE IMPRISONMENT, 1.

**MANDAMUS.**

Application of manufacturer of fertilizer for certificate.

See AGRICULTURAL LAW.

Right of corporation to use title of predecessor.

See CORPORATION, 2.

**MANDAMUS — Continued.**

Questions relating to commutation, compensation and paroles of prisoners not determined on mandamus.

See CRIME, 5.

Correction of return of canvass of soldier votes.

See ELECTION LAW, 1-3, 5, 6.

Enforcing order of commissioner of water supply in New York city.

See NEW YORK CITY, 1.

Right of taxpayer to inspect records of department of water supply.

See NEW YORK CITY, 6.

**MASTER AND SERVANT.**

1. *Action for breach of contract employing actress — evidence raising question for jury — evidence tending to show motive of defendant — erroneous refusal to charge.* Action brought by the plaintiff, an actress employed in the production of motion picture films, to recover damages for an alleged wrongful discharge by her employer before the expiration of the term of her employment. It is claimed by the plaintiff that she was compelled by the defendant to do additional work in order to provoke a controversy and to afford a pretext for her discharge, while the defendant contends that the plaintiff was insubordinate and refused to perform her obligations under the contract. Evidence examined, and held, that the case presented issues of fact for the determination of the jury.

It was competent for the plaintiff to show that the defendant had no further use for her services at the time of the discharge owing to the fact that the moving picture film had been completed and to show that in placing the additional work upon her the defendant was not acting in good faith. But such evidence was competent only to enable the jury to determine the credibility of witnesses upon the issue as to whether the plaintiff was insubordinate and whether the defendant was justified in discharging her.

In such action it was reversible error to decline to charge, at the request of the defendant, that if the plaintiff was guilty of a refusal to perform her duty, or of insubordination, the defendant was justified in discharging her, irrespective of any question of good faith. *Grey v. Triumph Film Corporation*, 107.

2. *Duty of loyalty — action for wrongful discharge — duty of servant to disclose secret agreement with former employer.* The obligation of loyalty, implied in the relation of master and servant, rests upon the rule that he who undertakes to act for another shall not in the same matter act for himself.

Where, in an action for an unlawful discharge, it appeared that the plaintiff's decedent, being an officer and active in the business of a corporation controlled by another company, agreed with it to effect a sale to the defendant of his own corporation, upon a commission based upon an inventory, and two days after making the sale entered into the service of the defendant but did not inform it of said agreement; and that, as the purchase price was to be determined by an inventory which was open to correction, the interests of the parties were adverse, it was error for the court to charge, as a matter of law, that the plaintiff's decedent was not obliged to tell the defendants that he was to receive compensation from his old employers and to refuse to charge that on the issues of loyalty to the defendant it was not necessary for the jury to find there was any actual disloyalty or dishonesty.

It was a question for the jury whether the plaintiff's decedent fulfilled his obligation of service by keeping the agreement secret. *Marshall v. Sackett & Wilhelms Co.*, 157.

3. *Railroads — negligence — injury to brakeman by catching glove on projecting bolt on car — liability of company for defects in car over which it had assumed control — evidence as to custom in reference to inspection — erroneous charge as to inspection.* In an action by a switchman against his employer and another railroad company to recover for personal injuries, it appeared that the plaintiff in the course of his duties was engaged in placing a freight car on a switch in the yard of the second defendant; that in removing another car belonging to a third company which had been brought into the yard and placed on the switch by the second defendant, plaintiff went to the top thereof to release the brake and in descending the ladder on the car his glove caught on a projecting bolt and he was thrown to the ground and sustained injuries.

**MASTER AND SERVANT — Continued.**

*Held*, that the plaintiff's employer, having assumed control over the car in question for the purpose of removing it, and having directed the plaintiff to work on and about it, was not entitled to a dismissal of the complaint on the ground that it had no control over said car and no opportunity of inspection thereof.

Questions by which the defendants proved, by a number of witnesses connected with various railroad companies, that it was not customary for such companies to give their inspectors instructions to condemn or repair cars on which there were projecting bolts fastening the stiles on a ladder to the car, and that the inspectors did not report such a condition as defective or take measures to have the same repaired, were not entirely free from criticism. The real inquiry should have been as to the custom of railroad companies in reference to existing projecting bolts on the stile of a ladder.

It was error for the trial justice in charging the jury to tell them that said witnesses of the defendants had testified that they would not regard the condition in question as defective.

A further charge "that the usual and ordinary inspection commonly adopted by other railroads is not negligence" constituted reversible error. *Cline v. Northern Central Railroad Co.*, 203.

4. *Negligence — writing under seal releasing master from liability — presumption that written instrument contains all of agreement between parties — evidence of prior parol agreement.* Where an employee of a telephone company gave it a release under seal, in consideration of the sum of one dollar "and other valuable considerations received from said corporation," including several payments made by it and the delivery of receipts therefor "the receipt whereof is hereby acknowledged," and thereby released and forever discharged said company from all liability on account of personal injuries, an assignee of said employee, in a subsequent action for the breach of an alleged prior parol agreement by the company to give said employee a life job at such work as he was able to do, is not entitled to show the parol agreement as it would be in violation of the rule which excludes evidence of an oral agreement in contradiction of a written instrument, especially since there is no evidence as to said parol agreement, except that given by the employee which is contradicted by the general superintendent of the company.

Where a contract indicates an intention to express the whole agreement between the parties and is consummated by writing, a presumption of law arises that it contains the whole of the agreement.

Evidence examined, and *held*, insufficient to sustain the burden of proof which was upon the plaintiff to establish the parol agreement. *Hayes v. Hudson River Telephone Co.*, 217.

5. *Action for breach of contract of employment — evidence raising questions for jury — erroneous dismissal of complaint.* Action to recover damages for breach of a contract employing the plaintiff to build up a sales organization for the defendant. Evidence examined, and *held*, that the jury would have been justified in finding that the plaintiff made an unqualified acceptance of the defendant's offer of employment and that a dismissal of the complaint was error.

*Held further*, that the contract of employment was binding although the plaintiff's duties were not definitely fixed.

While it is common to specify duties in a contract of employment it is not an essential where the contract makes the employer the judge of what is to be done and names the one whose orders the employee undertakes to carry out.

*Held further*, that the evidence might justify a finding that the employment was for the term of one year. *Cudney v. Phillips Manufacturing Co.*, 257.

6. *Action for wrongful discharge — defense — negligence of employee — verdict against weight of evidence.* In an action by an employee against his employer to recover damages for an alleged wrongful discharge, the defendant sought to justify on the ground that the plaintiff had been guilty of negligence in conducting defendant's business, resulting in a substantial loss of property.

*Held*, that a verdict in favor of the plaintiff was against the weight of the evidence, and that a judgment entered thereon should be reversed and a new trial ordered. *Getty v. Roger Williams Silver Co.*, 413.

**MASTER AND SERVANT — Continued.**

7. *Negligence — action by carpenter against his employer, a contractor, and the owner — reversible error — evidence that plaintiff's employer was insured under Workmen's Compensation Law.* In an action by a carpenter against his employer, a contractor, and the owner of the buildings in course of construction, for personal injuries alleged to have been sustained by being struck by a scantling thrown out of an upper window by an employee of the owner, the action having been discontinued as to the contractor, it was reversible error to allow the defendant over plaintiff's objection to introduce evidence that plaintiff's employer was insured under the Workmen's Compensation Law, where it was not followed by proof that plaintiff had applied for or received compensation. *Posnick v. Crystal*, 660.

8. *Negligence — death by fall from scaffold — Labor Law — requirement that guardrail of scaffold be bolted — failure of master to comply with statute — erroneous charge.* Section 18 of the Labor Law requires the guardrail of a scaffold to be "properly bolted, secured and braced," and where in an action to recover for the death of one who fell from a scaffold it is admitted by the master that the guardrail instead of being bolted in its socket was tied with rope, it was error to submit to the jury the question as to whether the guardrail was properly attached in compliance with the statute.

Section 18 of the Labor Law has a purpose beyond declaring the common-law obligation of a master, and its specific requirements must be complied with. Proof of a violation of the statute is sufficient to establish negligence of the master as a matter of law.

Such erroneous submission constitutes reversible error where the plaintiff claims that when her intestate fell from the scaffold he had hold of the guardrail and might not have fallen but for the fact that it was not secure. *Carr v. Gottschaldt*, 810.

*Negligence — death.* *Barnhardt v. American Concrete Steel Co.*, 881.

*Free medical attendance to employees — negligence.* *Kanaley v. General Electric Co.*, 899.

*Indemnity insurance — injury to employee under lawful age.*

See INSURANCE, 4.

**MORTGAGE.**

1. *Agreement as to priority of holders of junior mortgage — right of mortgagees having priority to satisfy mortgage debt and accept other security — failure to show bad faith.* Where the defendants, holding a fifth mortgage on real estate, the value of which was exceeded by the prior liens, entered into an agreement with the plaintiff which recited that the interest of the defendants in the mortgaged debt was prior and superior to that of the plaintiff who owned the residue of the debt and that the defendants were authorized to accept payment of the bond and mortgage and to satisfy the same, or to foreclose on default and receive the proceeds of the sale, being liable only to account to the plaintiff for all moneys received in excess of the prior interest of the defendants in the mortgage, the defendants had a legal right to protect their superior interest by satisfying the mortgage for a sum of money and the issuance of another mortgage on other unincumbered property, there being no bad faith on their part. Under the circumstances the defendants were not trustees for the plaintiff and had the right to collect or exchange the security without waiting until the maturity of the mortgage.

The mere satisfaction of the mortgage by the defendants establishes no ground of damages to the plaintiff since the mortgaged property was fully covered by prior liens.

It seems, however, that had the defendants been charged with bad faith they might have been called upon to justify their act. *Thomas v. Zahka*, 173.

2. *Election of remedies — prosecution to judgment of one remedial right — foreclosure — lease subordinate to mortgage — tenant as party defendant — prayer that lease be cut off is election of remedies and tenant not liable for rent — order of discontinuance of foreclosure action as to tenant and vacating judgment.* The prosecution to judgment or decree of one remedial right constitutes a conclusive election and bars a subsequent prosecution of an inconsistent remedial right.

**MORTGAGE — Continued.**

Wherein an action to foreclose a mortgage upon property incumbered by a lease subordinate to the mortgage and having a long time to run, the tenant in possession is made a party defendant and judgment cutting off his lease is prayed for, there is an irrevocable election of remedies, and where the tenant immediately upon the entry of judgment vacates the premises, both the mortgagee which became the purchaser on the sale and foreclosure and the plaintiff, its grantee, which sues for rent on the theory that the lease was not cut off by said sale, are equitably estopped from insisting that said defendant be held to its lease.

An order discontinuing a foreclosure action and vacating the judgment therein entered, as against the tenant, who never resumed possession of the leased premises, was not effective to hold him for rent. *481 Eighth Avenue Co., Inc., v. Childs Co.*, 742.

3. *Foreclosure — appointment of receiver — necessity for notice of application.* A clause in a mortgage authorizing the appointment of a receiver upon default does not dispense with notice of the application.

Nor does a clause that upon default the mortgagee may enter the premises, take possession thereof and receive the rents and profits, dispense with the necessity of notice.

A letter written by the attorney for the plaintiff in a suit for the foreclosure of a mortgage to another attorney is not equivalent to notice of an application for the appointment of a receiver, where the authority of the attorney to receive the notice is not established and the letter lacks the requisite precision.

If an order for publication is made on account of the evasion or the absence of the defendant, the appointment of a receiver may be had without notice. *Straus v. Minkowski*, 877.

Parol agreement extending time of payment — Statute of Frauds.

See CONTRACT, 5.

Suit to foreclose deed as mortgage.

See CORPORATION, 3.

Foreclosure of corporate mortgage.

See CORPORATION, 6.

Restrictive covenants — rights of purchaser on foreclosure.

See REAL PROPERTY, 1.

**MOTOR VEHICLE.**

Agreement of manufacturer to share profits with purchaser.

See CONTRACT, 1.

Action on policy of automobile insurance.

See INSURANCE, 1.

Death of occupant of hired automobile which ran into excavation.

See NEGLIGENCE, 5.

**MUNICIPAL CORPORATION.**

*Contract between city and construction company construed — personal liability of contractor to abutting owner — right of abutting owner to sue upon said contract.* Contract between a company engaged in constructing a subway and the city of New York construed, and held, to indicate an intention on the part of the contractor to become personally liable to an abutting owner for injury to his property;

That there was such privity between the city and the party to the contract and the abutting owner as to authorize the latter to sue upon the contract made in his behalf. *Schnaier v. Bradley Contracting Co.*, 538.

Establishment of police districts and election of police justices within towns.

See CONSTITUTIONAL LAW, 2.

Secondary franchise to use public streets for electric wires must be obtained from municipalities — estoppel.

See CORPORATION, 5.

City judge of Yonkers is city officer — appointment by mayor.

See COURT.

**MUNICIPAL CORPORATION — Continued.**

Damage from water escaping from hydrant.

See NEGLIGENCE, 9.

Application of prison commissioner to compel supervisor to place lavatory in jail.

See PRISONS.

Enjoining village from polluting water.

See WATER AND WATERCOURSES, 2.

**NEGLIGENCE.**

1. *Failure of owner of building to equip stairway with handrail — evidence raising issue under Labor Law — erroneous submission of issue as to common-law liability — new trial necessary where general verdict rendered after erroneous submission of issue.* Action to recover damages for personal injuries received by the plaintiff who, while employed in a building used for the manufacture of wearing apparel, fell down a winding stairway which lacked a rail upon one side. Evidence examined, and held, that it was proper to submit to the jury the question as to whether the building was a factory within the meaning of the Labor Law and that a finding on that issue in favor of the plaintiff should not be disturbed.

*Held further*, that there was no evidence sufficient to justify the court in submitting to the jury, in addition to the liability of the defendant under the Labor Law, the question as to whether the defendant, who was owner of the building, had failed to perform a common-law obligation to provide and maintain a reasonably safe stairway.

As the jury found a general verdict for the plaintiff and may have founded the same upon the issue erroneously submitted, the judgment must be reversed and a new trial ordered. *Irwin v. Simon*, 93.

2. *Artificial food product — failure of manufacturer to warn customer of possible deterioration — liability of manufacturer for injuries caused by deteriorated food.* The manufacturer of an artificial infant food, which is widely sold in sealed packages, is chargeable with negligence where it knows or should know that the product is liable to deteriorate and become dangerous to health, either by time, climate or temperature, or by the manner in which it is kept, if he fails to affix to the package the date of manufacture and the time during which the ingredients may safely be used, or the manner in which they should be handled and preserved to prevent deterioration. Hence, where such information is not affixed to the package, an infant who was made ill by being fed on the product, which had deteriorated and become poisonous, may recover damages.

*It seems*, however, that the mere vendor of patent medicines or other preparations not manufactured or prepared by him, is not liable to third parties for injuries therefrom without proof of negligence on his part. *Rosenbusch v. Ambrosia Milk Corporation*, 97.

3. *Carriers — liability of express company for negligent delay in transportation of horses resulting in their sickness and death — evidence — effect of request by shipper for extension of period of confinement without unloading.* In an action by a shipper against a carrier for negligence it appeared that the plaintiff shipped by an express company, of which the defendant is president, a carload of horses; that with close train connections and good management the journey might have been made within from twenty-four to twenty-eight hours, but fifty-five hours were consumed; that when the horses reached their destination they were in a weakened, enfeebled condition, one died almost immediately and four others within two weeks, three of them having developed pneumonia within a day or two after they were unloaded; that the contract released the company from all liability for delay or injuries to the said animals unless caused by the company or by the negligence of its agents or employees, and that delay was caused by defects in the cars, and there was no evidence that the company used any care by inspection or otherwise in the selection thereof.

*Held*, on all the evidence, that there was a negligent delay in the transportation of the horses causing sickness and death among them for which the defendant is responsible, but the judgment should be modified by



**NEGLIGENCE** — *Continued.*

deducting the amount allowed for the death of two of the horses, there being no evidence connecting their death with the delay in transportation.

A request by the plaintiff pursuant to the Federal statute that the period of confinement of the animals without unloading be extended from twenty-eight to thirty-six consecutive hours, was not an agreement that the express company might consume thirty-six hours in the journey. *Plass v. Barrett*, 131.

4. *Action by executrix and sole legatee to recover for death caused by negligence — when proceeds of action belong to widow — agreement by executrix to pay attorney half of recovery — attorney's compensation measured by amount of settlement — action should not continue after settlement to fix amount of attorney's compensation.* Where a person killed by negligence bequeathed all his property to his mother, although he had a wife living, and the mother, as executrix, brought an action to recover for the testator's death, the widow, being the sole beneficiary of the right of action, had power to settle the same with the defendant and the executrix is only entitled to the sum necessary to protect her for funeral expenses paid and for her liability to her attorney for services in the action.

When the executrix entered into a contract with her attorney to pay him half of any recovery or settlement as compensation for his services, the amount of his compensation should be based upon the amount paid to the widow on the settlement of the action although, in spite of the settlement, the court erroneously allowed the trial to proceed which resulted in a verdict much larger than the amount of the settlement. *Davis v. New York Central & H. R. R. Co.*, 228.

5. *Motor vehicles — municipal contractor — death of occupant of hired automobile which ran into excavation — erroneous charge — liability of one who hires automobile for negligence of chauffeur.* Action against the city of New York and a municipal contractor to recover for the death of the plaintiff's intestate who, while riding in a hired automobile driven by a professional chauffeur, was killed by the overturning of the car which ran into an excavation alleged to have been left in the night time without guard and without lights. It appeared that the intestate took no part in and gave no directions as to driving the car, except by directing the chauffeur as to their destination.

*Held*, that a judgment for the defendant should be reversed because of an erroneous charge which involved a ruling that any negligence of the chauffeur which contributed to the accident was imputable to the intestate. *Harding v. City of New York*, 251.

6. *Carriers — contributory negligence — liability of railroad company for loss of jewelry left by passenger in dining car — evidence — presumption as to commission of crime — appeal — when exception to erroneous charge not necessary.* In an action by a passenger of defendant railroad company to recover for the loss of jewelry valued at about \$1,200, claimed by her to have been tied in a handkerchief and left in the defendant's dining car upon the table, evidence examined, and *held*, insufficient to establish proof of theft, or negligence of the defendant, rendering it liable for the loss.

No one is presumed to have committed a crime; the presumption is otherwise.

Whether or not the plaintiff was guilty of contributory negligence in leaving her jewelry tied in a handkerchief upon the table in the defendant's dining car was a proper question for the jury.

An exception is not necessary when the court has charged on an entirely erroneous theory. *Barden v. New York Central Railroad Co.*, 306.

7. *Street railroads — contributory negligence — injury to person waiting for car by fall caused by her umbrella catching against car going in opposite direction — evidence — right of motorman to assume that adult will not come nearer to track — Highway Law, relating to rules of road, not applicable to street railroad.* In an action against a street railway company it appeared that the plaintiff, standing under a bright light in the roadway in the usual place to board a car and holding an umbrella low to cover her hat, caught the same against the side of a car going in the opposite direction and was thereby caused to fall. Evidence examined, and

*Held*, that the plaintiff was guilty of contributory negligence and that the complaint should be dismissed;

**NEGLIGENCE** — *Continued.*

That as the plaintiff was an adult, the defendant's motorman had the right to assume that she would not step any nearer to the track.

The Highway Law, section 332, providing as a rule of the road that vehicles turn to the right of the center, does not apply to a street railroad. *Campbell v. Richmond Light & Railroad Co.*, 320.

8. *Injury caused by defective stairway — evidence — condition of step after accident — proof raising question of fact as to negligence of owner of building — contributory negligence for jury — notice of defective condition given to tenant.* Where a plaintiff, who fell down a stairway owing to the fact that her heel caught in a crack in one of the steps, sues the owner of the building, who had control of the hallways and stairways, to recover for personal injuries received, it was error for the court to refuse to allow the plaintiff to show the condition of the step by the testimony of her son who examined it shortly after the accident on the same night.

So too, it was error to dismiss the complaint where the plaintiff had given evidence to the effect that she received said injury when descending the stairway, which was unlighted, after a call upon a friend who was a tenant of an upper apartment used for residential purposes and that the defendant retained control of the stairway and was under duty to make repairs and that three months before the accident the plaintiff, when making a similar call, observed the crack in the step and that the edge thereof was worn. Such testimony was sufficient to take the case to the jury on the question of the common-law liability of the defendant; there being no claim under the statute.

On such evidence it cannot be said that the plaintiff was guilty of contributory negligence as a matter of law and the jury would have been justified in finding that she exercised proper care.

As the defendant employed no janitor but made inspections of the building by its president, and the tenants were required to notify the defendant if repairs were needed, it was error to exclude evidence that the plaintiff drew the attention of the tenant upon whom she called to the condition of the step three months before the accident. *Brenner v. Landsmann Co.*, 331.

9. *Municipal corporations — liability of city for damage to goods from escape of water from high pressure hydrants — results of omission to produce evidence as to cause of injury.* While a municipality is not liable for escape of water from its mains or hydrants without evidence of negligence, a city having the duty of inspection and user over the apparatus causing damage, is subject to the results of omitting to produce evidence showing how the injury arose or what was the difficulty on the occasion of such damage.

In an action against the city of New York for damage to goods in a warehouse caused by water, it appeared that a high pressure hydrant burst between nine and ten A. M., and that the water was not shut off until some time between eleven and twelve. The broken hydrant, the chief evidence of the cause of the injury, was not produced as it had been disposed of for junk, and the city made no explanation. Evidence examined, and held, that a judgment in favor of the plaintiffs should be affirmed. *Higginson v. City of New York*, 367.

10. *Ships and shipping — liability of owner of ship for injury to second mate caused by end of cable breaking away from fastening to winch — expert testimony — evidence insufficient to establish negligence — assumption of risk — maritime law applied — Federal statute making master of ship alter ego of owner not retroactive.* In an action by a second mate employed by the defendant, a foreign corporation, which owned and operated a merchant ship, to recover damages for personal injuries caused by the end of a cable which broke away from its fastening to a winch on the ship by reason of the alleged negligent use of a defective appliance to secure such fastening, or failure to inspect such appliance, it appeared that the plaintiff was familiar with the manner in which the cable should be fastened; that expert testimony as to the method of fastening the cable was received, but there was no evidence that the clamp used by the defendant was insufficient in its mechanism or strength or as to the reason for its giving way.

Held, on all the evidence, that the negligence of the defendant was not established;

**NEGLIGENCE** — *Continued.*

That the plaintiff knew how the cable was fastened and assumed the risk of its insufficiency, if such insufficiency existed.

An action of this kind must be determined under the substantive maritime law which may be enforced in an action in a State court where the procedure is such as to warrant the same.

A vessel and her owner are liable to an indemnity for injuries received by seamen in consequence of failure to supply and keep in order the proper appliances appurtenant to the ship.

The act of Congress, passed on the 4th of March, 1915, by which it is sought to make the master of a ship the *alter ego* of the owner, is not retroactive. *Knapp v. United States Transportation Co.*, 432.

11. *Landlord and tenant* — *liability of owner for death of sublessee of furnished rooms killed by falling of chimney while hanging clothes on roof* — *licensee* — *evidence insufficient to establish easement over roof as appurtenance to lease*. In an action by a subtenant of two furnished rooms on the top floor of defendant's building, to recover for the death of his wife who, while upon the roof to hang out some washing, was killed by the falling upon her of a part of the chimney, there was no evidence in the lease executed by the defendant, or in any of the subleases, that the roof or any part of the premises was reserved or set aside for use of tenants for drying clothes. It appeared that the only means of access to the roof was by climbing an ordinary fire ladder, pushing off a scuttle and climbing through the opening, and that the roof was of tin without boards or slats for people to walk on, and contained no provisions for fastening clothes lines.

*Held*, on all the evidence, that the deceased was a mere licensee and that a judgment in favor of the plaintiff must be reversed and the complaint dismissed.

The plaintiff, as a subtenant of the rooms, had no easement over the roof as an appurtenance to his lease and the mere fact that his immediate landlord in violation of the principal lease, even with the acquiescence of the owner, permitted housekeeping in the rooms did not create an easement over the roof. *Keesey v. O'Reilly*, 665.

12. *Trial* — *action for personal injuries* — *challenge of juror for cause* — *when juror impartial*. Where during the selection of the jury in an action for damages claimed to have been sustained by an infant who was run over by defendant's automobile, after plaintiff had exhausted all his peremptory challenges, one of the jurors volunteered the statement that he operated a car and had a "sort of prejudice against a case of this sort," and asked the court to excuse him, and thereupon he was challenged for cause by plaintiff's counsel and his examination by the court did not establish that he *would* decide the case on the evidence alone, regardless of his prejudices, the challenge should have been sustained and the refusal so to do constitutes reversible error.

A juror to be held to be impartial must be indifferent as he stands unsworn. *Haas v. Newbery*, 772.

Finding contrary to evidence. *Hoykendorf v. Bradley Contracting Co.*, 922.

Insufficient evidence. *Schrager v. Foster*, 923.

Deviation of freight from agreed route.

*See* CARRIER, 1.

Liability of carrier under bill of lading for damage to goods in transit.

*See* CARRIER, 2.

Injury to livestock in transit — uniform bill of lading.

*See* CARRIER, 3.

Railroad — injury to brakemen.

*See* MASTER AND SERVANT, 3.

Release under seal.

*See* MASTER AND SERVANT, 4.

Injury to carpenter — insurance of master under Workmen's Compensation Law.

*See* MASTER AND SERVANT, 7.

Death by fall from scaffold.

*See* MASTER AND SERVANT, 8.

**NEGLIGENCE — Continued.**

Action for breach of contract to care for dog — allegation as to defendant's negligence.

See PLEADING, 1.

Individual liability of trustee in control of tenement house for negligence in making repairs.

See TRUST, 1.

**NEGOTIABLE INSTRUMENTS.**

See BILLS AND NOTES.

**NEW YORK CITY.**

1. *Water supply — power of commissioner to direct water company to extend its distribution system — statutes construed — order of commissioner enforced by mandamus.* A corporation organized under section 80 of the Transportation Corporations Law for the purpose of supplying water to the authorities and inhabitants of the former town of Jamaica, now incorporated in the city of New York, is required by statute to supply said authorities and inhabitants with pure and wholesome water at reasonable rates and cost and, by virtue of section 472 of the charter of Greater New York, the commissioner of water supply, gas and electricity in his power to exercise superintendence, regulation and control in respect of the supply of water by such company may direct it to install new mains and hydrants at its own expense.

Such order of the commissioner will be enforced by mandamus where it is not capricious, arbitrary, unreasonable or tyrannical.

The powers conferred upon said commissioner by section 472 of the Greater New York charter do not relate merely to the "sources" of water supply, but have to do with distribution to the municipal corporation and to individual consumers. *City of New York v. Jamaica Water Supply Co.*, 49.

2. *Authority of city to regulate use of franchise by gas company.* The right to regulate the use of a franchise by a gas light company is not exhausted by the regulations prescribed by the municipal authorities of the city of New York at the time of granting the consent which conferred the franchise.

Under the provisions of the Greater New York charter, the commissioner of water supply, gas and electricity has full jurisdiction, charge and control of the transmission of gas by pipes and conduits, which includes the locating of the pipes and prescribing the dimensions of the mains and filing maps and plans with the department, but he has no legislative authority to compel a gas company to pay inspectors appointed by him as a condition of allowing it a permit to install conduits and pipes for the use and transmission of gas.

The Legislature may, however, compel public service corporations to pay the expenses of public regulation. *City of N. Y. v. Woodhaven Gas Light Co.*, No. 2, 188.

3. *Damages caused by change of street grade — amendment of section 951 of charter making decision of board of revision conclusive — award cannot be reviewed by certiorari — failure to appeal to board of revision.* Since section 951 of the Greater New York charter was amended by chapter 516 of the Laws of 1916, which expressly provides that a party interested in an award made for damages caused by a change of street grade may appeal to the board of revision of assessments and that the determination of said board shall be final and conclusive, an award made to an abutting owner by the board of assessors cannot be reviewed by writ of certiorari.

The issuance of the writ cannot be justified upon the ground that the property owner has never taken the statutory appeal to the board of revision, for in such case he has not exhausted his legal remedy and certiorari ordinarily will not issue until the statutory remedy has been exhausted. *People ex rel. Globe Const. Co., Inc., v. Ormond*, 242.

4. *Right to erect and maintain public bath — injury to adjoining easements by encroachment upon public street — eminent domain — just compensation must be made — when removal of encroachment not compelled by injunction — relief by way of compensatory damages — when no damages for injury to right of access.* While the city of New York under its police powers may erect and maintain a public bath for the conservation of the health of its inhabitants, it has no right to erect an entrance with columns which extend

**NEW YORK CITY — Continued.**

beyond the building line and encroach upon the street to the detriment of the easements of light, air and access appurtenant to adjoining property.

While section 50 of the charter of the city of New York relating to municipal powers may authorize the city to appropriate a portion of a street for access to a public bath so that such structure will not constitute a public nuisance, it cannot deprive an adjoining landowner of easements in light, air and access without just compensation, for such property rights are within the protection of the provisions of the Constitution relating to the exercise of eminent domain.

However, the city will not be required by injunction to remove such structure when the injury to easements of light, air and access may be compensated in damages and especially so when the expense and inconvenience to the city by removing the structure and remodeling the building will greatly exceed the damages to adjoining property.

In such case the court will refuse injunctive relief and either remit the plaintiff to his action at law, or will award him damages.

Damages will not be awarded for injury to the plaintiff's right of access to his premises where he himself has encroached upon the street to an equal extent by the erection of railings and a cellarway, but he is entitled to compensation for the appropriation in the easements of light and air. *Hellinger v. City of New York*, 254.

5. *Schools — salary of teachers — judgment — res adjudicata.* A schedule adopted by the board of education of the city of New York, under the Davis Act (Laws of 1900, chap. 751, § 4), giving to a critic teacher the same salary as a model teacher, although the critic teacher was a regular teacher within the meaning of the statute, is invalid, and such teacher may recover for loss of salary incurred by being so classified.

But such teacher in a subsequent action cannot relitigate her rights for the period covered by the first action.

Such a critic teacher is an assistant teacher within the meaning of chapter 902 of the Laws of 1911, and is entitled to salary according to the general schedule for assistant teachers in force when said act took effect. *Sullivan v. Board of Education*, 477.

6. *Right of taxpayer to inspection of records of department of water supply, gas and electricity relating to bursting of water main in street adjacent to his premises — mandamus — effect of removal of records to another city department.* A taxpayer, whose premises have been damaged by the bursting of a water main in an adjacent street, is entitled, under section 51 of the General Municipal Law and under section 1545 of the Greater New York charter, to an inspection of the reports of the engineers of the department of water supply, gas and electricity, and all other records, papers and documents relating to the bursting of the main, in order to obtain information or evidence to enable him to prepare for the trial of his action for damages.

A petitioner for a writ of mandamus to compel an inspection of such records should not be required to institute new proceedings because said records have been removed to the law department, as it is within the jurisdiction of the commissioner of the department of water supply, gas and electricity to require their return for the purpose of inspection. But if the commissioner should endeavor to obtain their return in good faith and fail, he should not be punished for contempt, and in that event it might be necessary for the petitioner to proceed against the head of the department to which the records have been transmitted. *Matter of Ihrig v. Williams*, 865.

Damages caused by sewer — when notice of intention to sue not necessary. See JUDGMENT.

**NUISANCE.**

Public nuisance — disorderly house.

See CRIME, 4.

**PARENT AND CHILD.**

*Adoption of adult — adoption alleged to be procured by undue influence for the purpose of acquiring property — complaint stating cause in equity to annul adoption — relief should be sought in equity not in Surrogate's Court.* Since the enactment of chapter 352 of the Laws of 1915, the adoption of a person of the age of twenty-one years and upward is permitted, and no consents save that of the person adopted and that of the foster parent are required.

**PARENT AND CHILD — Continued.**

As such adoption effects the devolution of property on the death of the foster parent and has the same result as a last will and testament, the courts, in determining the validity of the adoption, should apply the same tests as in the case of a testamentary act, and to that end undue influence and lack of testamentary capacity on the part of the foster parent may be shown to nullify the adoption.

The complaint in a suit in equity brought by an heir and next of kin to set aside an adoption made by his ancestor, which in substance alleges that the person adopted was a woman forty-seven years of age and was living apart from her husband in adulterous intercourse with the decedent, and that for the purpose of securing his property without the necessity of procuring the probate of a will, coerced and induced the decedent, a man infirm mentally and physically, to adopt her, states facts which allow proof of undue influence.

For a man to adopt a woman with whom he is living in adultery is against public policy, and to attempt to obtain an approval of such adoption by the surrogate is a fraud upon the court.

The heir and next of kin of such deceased foster parent may maintain a suit in equity to annul the adoption, and is not restricted to a motion before the surrogate to vacate it.

An adoption proceeding is not judicial, but merely involves the approval by the surrogate or the county judge of a contract between the parties.

Decisions which hold that the surrogate has jurisdiction to vacate an order approving and confirming an adoption are disapproved. *Stevens v. Halsead*, 198.

**PARTITION.**

*Appointment of receiver — insufficiency of moving papers — offer of defendant to purchase property at appraised value — form and contents of order appointing receiver.* Property involved in an action of partition or of foreclosure will not be taken from the party in possession and placed in charge of a receiver during the pendency of the action, except upon clear and convincing proof that there is danger of loss or damage, and that such appointment is necessary for the protection of the parties to the action, and their interests. There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established.

Hence, in an action for partition of property owned by three children as tenants in common, a receiver should not be appointed upon the complaint and the affidavit of the plaintiff, where the only ground stated is in effect that there is hostility between the owners of the property and that confusion may result detrimental to the interests of the parties, and no reason is shown why the management of the property during the pendency of the action by the defendant will not be as satisfactory as it has been during the last twelve years during which no complaint has been made, and there is nothing to show that the defendant is not financially able to make good any deficiency.

Moreover, an order appointing a receiver in such an action should be reversed, where it appears that the defendant has offered to purchase the plaintiff's interest in the property at its appraised value, and where under said order the defendants only are enjoined and restrained from collecting the rents during the pendency of the action.

A direction to a receiver after deducting his fees and disbursements from the proceeds of the sale of the property, to apply the remainder to the deficiency that may exist in the amount directed to be paid to the plaintiff is suitable and proper in a foreclosure action, but not in an action of partition, where there is another defendant entitled to precisely the same relief and protection as the plaintiff. *Laber v. Laber*, 733.

**PARTNERSHIP.**

1. *Agreement creating joint adventure — agreement to share profits received from sale of goods to foreign government — mutual duties of coadventurers and agents — secret sale made to detriment of coadventurer — liability to account for profits.* Suit to compel the defendant to account for a portion of moneys received by it as profits upon a contract. It appeared that the defendant and the plaintiff's assignor had entered into an agreement

**PARTNERSHIP** — *Continued.*

whereby, if the assignor procured for the defendant a contract to manufacture and deliver tents to a foreign government, the assignor was to receive a certain share of the profits, and the defendant further agreed that it would act only through the plaintiff's assignor and would not approach the proposed purchaser in any other way. The assignor having negotiated said sale with an agent of the foreign government and the substantial terms of the sale being settled, except as to a minor detail, the defendant, in violation of its agreement with the assignor, secretly negotiated a sale to the foreign government on its own behalf and furthermore agreed to give to the agent of the foreign government a rebate on the sums received for the tents. Evidence examined, and *held*, to sustain a decree requiring the defendant to account.

The defendant's corrupt agreement to give a rebate to the agent of the foreign government was an act which discredited the testimony of all persons who participated therein.

The defendant and the plaintiff's assignor, although not principal and agent strictly speaking, occupied an analogous relation which required a duty of utmost good faith and required the defendant to refrain from obstructing the negotiations between the assignor and the purchaser.

Copartners, joint adventurers and agents owe the duty of utmost good faith and fidelity to their copartners, coadventurers and principals and they are accountable for any secret profits that they have made whether within or in excess of their authority.

Moreover, until such relationship is terminated a copartner, or joint adventurer, cannot act for himself.

The above rules hold although under the agreement between the defendant and the plaintiff's assignor they were not interested in the same identical portion of the profit.

The defendant should be required to account to the plaintiff on the basis of its proposed contract with the plaintiff's assignor for the difference between the amount it was to receive under that contract and the amount it received under the contract with the purchaser. *May v. Hettrick Brothers Co.*, 3.

2. *Validity of agreement creating — provision that one partner shall not be liable for debts incurred by the other.* An adequate and unequivocal written agreement establishing a partnership is not affected by a provision that one of the parties shall not be liable for debts or liabilities incurred by the other in the business.

Said parties having agreed so to associate themselves, it was competent for them to determine how the profits and losses should be apportioned. *Haber v. Orszag*, 771.

3. *Advance of moneys secured by a mortgage to further enterprise to develop lands and share in profits — when such agreement constitutes copartnership — bankruptcy — evidence — testimony of admitted perjurers — new trial.* Profits promised to a stranger to the business of a copartnership for the use of money to be used in the partnership do not make him a partner.

But where such third person and the members of the partnership draw articles in which they expressly say that they form a partnership to develop and improve certain real estate and each contributes land for the sites of buildings to be erected and each agrees to pay a share of the expenses, debts and obligations and is to receive an equal part of the proceeds and income, and the members of the former partnership are expressly authorized to represent and act for said third person, a partnership exists for the specific enterprise in spite of the fact that the repayment of the money contributed by the person joining in said enterprise is secured by a mortgage on the lands.

Where the members of the prior partnership, on their bankruptcy, testified that a conveyance of their interest in said lands to the new partner participating in the real estate enterprise was made in good faith, but after their discharge and on the appointment of a new trustee in bankruptcy testified that their conveyances to the new partner were designed to defraud creditors, so that they are confessed perjurers, their testimony in a suit brought by the trustee in bankruptcy to set aside the conveyance is useful only for the purpose of discovery or explanation of independent facts.

**PARTNERSHIP — Continued.**

On all the evidence, *held*, that there must be a reconsideration of the case in view of the present holding that the agreement of the parties constituted a partnership and that a new trial is necessary. *Gray v. Rosendorf*, 824.

**PARTY.**

Action for breach of contract for production of musical play.

*See* CONTRACT, 3.

Suit to compel issuance of stock certificates — parties defendant.

*See* CORPORATION, 4.

Examination of defendants before trial.

*See* DEPOSITION.

Foreclosure — tenant as party defendant.

*See* MORTGAGE, 2.

Right of abutting owner to sue upon contract between city and construction company.

*See* MUNICIPAL CORPORATION.

**PAUPER.**

*See* POOR LAW.

**PENAL LAW.**

[For table containing all sections cited in this volume, see *ante*, p. lxxv.]

**PHYSICIAN.**

*Obligations of physician towards patient — agreement to cure disease — liability for malpractice — pleading — complaint stating action for malpractice — limitation of action.* The contract of a physician to cure a patient does not mean that in case of failure he will pay the damages resulting from the malady continuing, or for the results of his lack of skill or ignorance, or for the physical consequence, or for treatment by other physicians necessitated by the patient's condition.

While a contract to cure a patient does involve the elimination of the patient's condition, the physician cannot be held responsible for suffering from a cause which he agrees to end but does not end, unless he is guilty of malpractice.

A physician must have skill, care and judgment and use them, and if he fails to use them and pain results therefrom, whether or no there be ultimate cure, he is liable.

*It seems*, that where a physician agrees to cure a patient and fails to do so the patient is absolved from payment and may recover advances made and expenditures for nurses, medicines, etc.

Complaint in an action brought by a patient against a physician examined, and *held*, not to state a cause of action for breach of contract but one for malpractice and negligence and that the complaint was properly dismissed as the Statute of Limitations had run upon the latter action. *Frankel v. Wolper*, 485.

Illicit traffic in drugs.

*See* CRIME, 1.

Advertisement by dentist in violation of statute.

*See* PUBLIC HEALTH LAW.

**PLEADING.**

1. *Action for breach of contract to care for dog — allegations as to negligence of defendant — complaint stating single cause of action — election.* A complaint which in substance alleges that the defendant agreed for a consideration to breed a valuable dog owned by the plaintiff and to skillfully care for, and return, the dog in the same condition of health as when delivered, but that the defendant returned the dog suffering from distemper caused solely by the negligence of the defendant in the care of the dog, etc., whereby the plaintiff has been required to expend moneys in the treatment and maintenance of the dog, which has become worthless, states but a single cause of action for damages for breach of contract. The charge of negligence in the care of the dog is merely a specification of the breach of contract.



**PLEADING — Continued.**

Allegations in respect to different theories upon which it is claimed that the defendant was guilty of a breach of duty under the contract do not set out different causes of action, nor do they involve different theories between which the plaintiff could be required to elect. *Moers v. Pell*, 1.

2. *Complaint — allegations in disjunctive — demurrer sustained.* Where the plaintiffs, suing to recover liquidated damages agreed upon in case the defendant solicited insurance business on behalf of a certain company, which business and the good will thereof the defendant had sold to the plaintiffs, allege in the disjunctive that the defendant in violation of its agreement solicited customers shown on the books of the specified company, "or" on the books of another company, "or" on the books of still another company, etc., a demurrer to the complaint should be sustained with leave to the plaintiffs to plead over. *Moffat v. Ainslie Co.*, 37.

3. *Libel — statement that case of contagious disease existed on plaintiff's premises — complaint not stating cause of action.* A complaint for libel which in substance alleges that the defendant published an article falsely stating that a case of infantile paralysis, which was then epidemic, existed in a house of a certain number on a certain street, being the same address at which the plaintiff was engaged in manufacturing and selling mattresses and bedding, whereby persons shunned and avoided the plaintiff's premises and certain customers refused to deal with him, resulting in certain losses of money, does not state a cause of action, there being no allegation that the publication was maliciously made and with a willful intent to injure the plaintiff's business. *Slanger v. Sun Printing & Publishing Assn.*, 245.

4. *Answer — counterclaim in action to recover for breach of contract to convey lands — alleged modification of contract — malicious filing of contract after default.* Where a plaintiff sues to recover earnest money paid on a contract for the sale of real estate and the expense of searching title, the defendant having failed to perform because the title was unmarketable, a counterclaim, which seeks to recover broker's commissions and attorney's fees upon allegations that the original contract of sale was modified and that the defendant was ready and willing to perform the modified contract and tendered a deed in conformity therewith and that the plaintiff defaulted, is insufficient in law and a demurrer thereto should be sustained.

Nor can a counterclaim be founded on the wrongful and malicious filing of the contract after the time fixed for passing title and after plaintiff's default, for it alleges a tort which does not arise out of the contract set forth in the complaint and is not connected with the subject-matter of the action. *Bloom v. Sutton*, 247.

5. *Amendment at trial allowing introduction of new affirmative defense unauthorized — evidence — admissibility of parol evidence to explain written contract — sale — waiver of time of payment.* An amendment at the close of a plaintiff's case, authorizing the defendant to plead both payment and an accord and satisfaction, thereby introducing a new affirmative defense, is unauthorized, as the motion should be made at Special Term.

Where a written contract for the sale "of all the good second-hand pipe" was made in reference to pipe located in the seller's yard, parol evidence of exclusion from the sale of certain pipe sold to another party is entirely inconsistent with the writing, and incompetent to vary the same.

Where an agreement to pay cash upon delivery has been waived by the purchaser's promise to pay within a short time, and the seller has not given notice of a date when it will require payment in cash, it is not in a position to claim, in an action against it for failure to deliver, that the purchaser has broken its contract by failing to pay cash upon delivery. *Pipe & Cont. Supply Co. v. Mason & Hanger Co.*, 317.

6. *Action based upon fraud and deceit — complaint not stating cause of action — when remedy of plaintiff is against corporation and not against person who organized same — allegations of fraud without damage resulting therefrom do not state cause of action.* A complaint which in substance alleges that the plaintiff's father and the defendant's testator conducted a certain hotel as partners and that the plaintiff and her sister succeeded to a one-half interest in the hotel property by the death of their father and mother, and that the defendant subsequently organized a corporation to which he sold the hotel property and falsely represented to the plaintiff that the

**PLEADING — Continued.**

value of the property was much less than the sum received therefor, etc., and that the plaintiff, relying on said false representation, accepted with her sister a sum of money which did not represent their real interest in the property, and that the plaintiff only discovered the fraud on the dissolution of the corporation, which made no accounting, etc., does not state a cause of action against the defendant in that no damages are alleged and the moneys in which the plaintiff claims to have an interest belong to the corporation, not to the defendant, and her remedy is against it.

Mere allegations of fraud and deceit without damages flowing therefrom do not state a cause of action. *Mahon v. Equitable Trust Co.*, 335.

7. *Complaint alleging loan of stock returnable on demand pursuant to valid express contract and praying equitable relief — demurrer — failure to state cause of action at law — effect of prior judgment holding contract invalid.* A complaint which shows that the plaintiff pursuant to the terms of a valid express contract executed by the defendant's president, loaned stocks to it returnable on demand, and alleges that plaintiff was induced to enter into said contract by reliance upon certain false statements by defendant's president, and that the defendant instead of using the stock to borrow money for a certain specified purpose, pledged it and used the money obtained for other purposes, and that the pledgee thereafter sold the stock, does not state a cause of action for an accounting, and since there was no allegation that any demand had ever been made for the return of the stock, it does not even state a cause of action at law and is, therefore, demurrable.

The court was not bound, under the circumstances, to hold the contract invalid on its face, because it was so held in another action between the same parties. *Logan v. Fidelity-Phenix Fire Insurance Co.*, 624.

8. *Denials essential to affirmative defense should not be stricken out.* Where in an action for the breach of a building contract, the plaintiff alleges non-performance on the part of the defendant, and also due performance of all the terms of the contract on plaintiff's part, except as waived by the defendant, and the defendant pleads as an affirmative partial defense that the plaintiff failed to assert its claim within ninety days as required by the terms of the contract, denials of plaintiff's allegations as to non-performance were in no sense essential to the affirmative defense, and were properly stricken out, but denials as to due performance by the plaintiff except as waived by the defendant were essential to the defense and should not be stricken out.

It is well settled that denials which are essential to render available the other facts pleaded as a separate defense should not be stricken out. *Soerbee, Inc., v. Jatison Construction Co., Inc.*, 662.

9. *Complaint alleging refusal to perform contract — when order sustaining demurrer will be reversed.* Where upon its face a complaint alleging defendant's refusal to perform a certain contract creating plaintiff sole selling agent for defendant's entire production of a certain kind of hats states a complete cause of action, an order sustaining a demurrer on the assumption that the defendant's refusal might have been based on its determination to discontinue the manufacture of hats of the kind specified will be reversed. It was not for plaintiff to assign a reason for defendant's breach of the contract; that was a matter for defendant to plead. *Knight v. Emmons Brothers Co.*, 751.

10. *Action founded on breach of contract cannot be sustained as action in tort — evidentiary matter contained in pleading not considered on demurrer — complaint stating cause of action for breach of contract.* Where a complaint, when stripped of improper allegations of matters which are evidentiary, is plainly intended to be based upon the breach of an express contract, it is error for the court to sustain the complaint on demurrer as one in tort based upon a breach of duty by the defendants as trustees.

Complaint containing evidentiary matter improperly pleaded analyzed, and held, to state a cause of action for breach of contract and that a demurrer thereto should be overruled. *Uhl v. Gayley*, 802.

11. *Bill of particulars — when affidavit of party applying for bill required — when moving affidavit by attorney insufficient.* The stringency of the rule requiring an affidavit of a party as a basis for a bill of particulars or other relief has been relaxed to some extent, and particularly when it appears

**PLEADING** — *Continued.*

that the attorney was familiar with the material facts and was in a position to make the affidavit quite as well if not better than the client; but the rule has not been abandoned and is peculiarly applicable to a case where the bill of particulars is not necessary to limit the issues, and should not be granted if the plaintiff possesses the information required by the bill of particulars.

Where, in an action to recover for loss under a fire insurance policy, the defendant alleged that the fire occurred while the property was in the possession of a company which the plaintiff, unknown to the defendant had by contract relieved from liability, and that the policy expressly provided that such a contract should constitute a cancellation thereof, a demand by the plaintiff after the service of the answer for a bill of particulars as to the name of the person claimed to have made the alleged contract and when and where it was made should not be granted, solely on the affidavit of one of its attorneys to the effect that he was informed by plaintiff that after diligent inquiry from its officers and employees it was unable to discover that any person in its employ made the agreement, especially where no one familiar with the business of the plaintiff made an affidavit denying the making of the contract as alleged by the defendant or denying knowledge with respect to who assumed to represent it, or his name. *General Film Co., Inc., v. L. & L. & Globe Ins. Co.*, 862.

Foreign law.

*See* **BILLS AND NOTES**, 4.

Counterclaim must be complete in itself.

*See* **CONTRACT**, 6.

Representative action by stockholder — demand that directors bring action.

*See* **CORPORATION**, 1.

Complaint stating action for malpractice.

*See* **PHYSICIAN**.

**PRACTICE.**

1. *Stay — when motion not granted — other action pending — cause not at issue.* It is only where a decision in one action will determine all the questions in another action, and the judgment on one trial will dispose of the controversies in both actions, that a case for a stay is presented.

Plaintiff and defendant N. S. entered into a contract for the exchange of property which provided a certain sum as liquidated damages to either for breach of the contract by the other. The defendant C. S. signed said contract, but assumed no obligation or liability thereunder. Before service of the summons and complaint in defendants' action against the plaintiff brought in the county where they resided for breach of the contract and liquidated damages, plaintiff instituted the present action, designating the county where he resides as the place of trial. Upon defendants' motion for a stay of proceedings in plaintiff's action it appeared that the defendant N. S. had not answered, and that her time to do so had not expired and that the plaintiff had not pleaded his counterclaim for liquidated damages in the defendants' action.

*Held*, that, under such circumstances, the defendants' motion for a stay should be denied.

Until both actions are fully at issue, it is impossible to say that a determination in one action will dispose of the other.

A motion to stay an action will not be granted until after the issues are complete. *Rosenberg v. Slotchin*, 137.

2. *Stay — when legal action not stayed pending suit in equity to enforce settlement of action — accord and satisfaction not executed.* Where an agreement to settle an action made on the eve of trial was never carried out and the cause was restored to the calendar on the plaintiff's motion and the defendants took no appeal from the order, they are not entitled to a stay of the plaintiff's legal action until the determination of a suit in equity brought by them for the specific performance of the agreement to settle the prior action.

*It seems*, that the defense of settlement could be set up by the defendants in the legal action by a supplemental answer, and until the court in its dis-

**PRACTICE** — *Continued.*

cretion has refused to allow such supplemental answer the defendants have no ground for a stay, which would deprive the plaintiff of his right to a determination of the issues by a jury.

Defendants' affidavits examined, and *held*, insufficient to establish a settlement which would prevent the plaintiff from prosecuting his legal action, or confer upon the defendants the right to compel the enforcement of the settlement in equity.

An attempted settlement of a cause not fully executed is not available as a defense to the action, or as a basis of a suit in equity to enforce a settlement. *Rubin v. Siegel*, 181.

3. *Action to determine claim to real property — claim of title by defendant — mode of trial — dismissal of complaint and exception thereto — findings not necessary — minute of exception taken in open court — preservation of right to appeal.* Where in an action under sections 1638 *et seq.* of the Code of Civil Procedure to obtain an adjudication of the invalidity of defendant's claim of title to real property of which plaintiff claims to be in possession, the defendant in his answer claims title, the trial must be had as in an action of ejectment, that is to say, before the court and a jury.

By virtue of section 1021 of the Code of Civil Procedure where the court in such action sets aside a verdict for the plaintiff and dismisses the complaint, it is not necessary for the court to make any findings of fact and its refusal to do so is not an error which will furnish ground for an exception.

The plaintiff preserves its rights upon appeal where the record of the trial shows that it entered an exception in open court to the decision setting aside a verdict in its favor and dismissing the complaint.

Although after a dismissal of the complaint and the plaintiff's exception thereto taken in open court the defendant entered an order embodying the court's decision, the latter order was unnecessary and superfluous and did not require a new exception by the plaintiff where the clerk's minutes embodied the decision of the court.

Where a complaint is dismissed at Trial Term the clerk's minute of the plaintiff's exception made in open court is sufficient warrant for an entry of judgment and affords a proper foundation for appeal. *N. Y. Inst. for Deaf & Dumb v. City of New York*, 184.

4. *Trial — indefinite postponement because absent witness is in Germany.* A motion for an indefinite postponement of a trial on the ground of the absence in Germany of a material witness calls for an exercise of discretion by the trial court.

The trial court did not err in an exercise of discretion by denying the defendant's motion for an indefinite postponement of trial where the moving affidavits allege that the absent witness was a resident of Berlin when the present war was declared and is believed to be in Germany, etc., and that it is impossible to communicate with him, there being nothing to show where the witness is or whether he is still alive. *Kent v. Fraser*, 813.

Order of Public Service Commission overruling demurrer to complaint — review by certiorari.

*See* CERTIORARI.

Stay — foreclosure proceedings.

*See* CORPORATION, 6.

Nonsuit as to one of several joint tort feasons — severance of action.

*See* COSTS, 1.

Executors of deceased executor cannot be burdened with distribution of estate — appointment of administrator c. t. a.

*See* DECEDENT'S ESTATE, 1.

Order for examination before trial should not refer to moving papers

*See* DEPOSITION.

Open commission to take testimony.

*See* DISCOVERY.

Bill of particulars — affidavit of moving party.

*See* PLEADING, 11.

**PRACTICE — Continued.**

Opening default of contestants on probate.

See SURROGATE.

[For table containing all sections of the Code of Civil Procedure cited and construed in this volume, see *ante*, p. lxxxiv.]

**PRINCIPAL AND AGENT.**

1. *Broker's action for commissions — release of commissions earned in consideration of new contract of employment — breach of second contract — election of remedies — right to recover consideration released or for breach of second contract — rescission — tender — damages — failure to show purchaser for lands was willing and able to perform — nominal damages — appeal — reversal where plaintiff may be able to show substantial damage.* Where the plaintiff, having been employed as a broker to sell or exchange lands and having procured a person willing to exchange, agreed with his principal, the defendant, to release his claims for commissions in consideration of the defendant's agreement to make the plaintiff his sole selling agent for the lands to be taken in exchange and to give him as compensation the amount which the plaintiff might secure from purchasers over and above a stated amount, etc., but the defendant made a breach of his agreement by refusing to make the exchange with the person originally procured by the plaintiff, so that he was unable to convey the lands to purchasers subsequently procured by the plaintiff, the latter had an election either to disaffirm the second contract of employment and recover, or be restored to the consideration with which he parted on making it, that is to say, to the commissions earned under the first contract, or to recover damages from the defendant for a breach of the second contract.

There was nothing which the plaintiff was called upon to tender back on rescinding the second contract for he had received nothing thereunder, nor was it necessary for him to allege a rescission as the bringing of the action constituted an election.

Complaint examined, and *held*, sufficient to justify a recovery either upon the theory that the action was in disaffirmance of the second contract of employment by reason of the defendant's breach thereof and for the recovery of the consideration, or whether it be considered as an action for damages for the breach of the second contract.

But the plaintiff can only recover the commissions earned under the first contract of employment, which he released as a consideration for the second contract, where he elects to rescind the second contract, and where he brings an action for the breach of the second contract he affirms it and irrevocably elects to pursue his remedy for such damages for the breach of the second contract as he may be able to show and necessarily concedes that the defendant is entitled to retain the commissions earned under the first contract.

In order to recover for a breach of the second contract the plaintiff must show that he produced a customer for the lands which the defendant had agreed to take in exchange, who was ready, willing and able to purchase the same, and on failure of such proof he is not entitled to recover substantial damages.

But although the plaintiff, on the theory adopted at trial, is not entitled to recover substantial damages, he has established a right to nominal damages by proof of the defendant's breach of the second contract of employment, and while the appellate court will not reverse a judgment to enable a recovery of merely nominal damages, where a party entitled to such damages has not received the same and it can be shown that on a new trial he may be able to show substantial damages and that injustice may be done by allowing the erroneous decision to stand, the appellate court may reverse because of the error and give the plaintiff an opportunity to show and recover substantial damages. *Shapiro v. Benenson*, 19.

2. *Broker's action for commissions on sale of real estate — evidence not justifying recovery — where negotiations with caretaker of property do not make her procuring cause of subsequent sale — distinction between status of established broker and caretaker of premises.* Action to recover broker's commissions for procuring a purchaser of the defendant's real estate. It appeared that the plaintiff was employed as a caretaker of a country estate owned by the defendant and that the person who eventually purchased the

**PRINCIPAL AND AGENT** — *Continued.*

property, being attracted by a sign stating that the premises were for sale and that application should be made to a certain broker or the purchaser's own broker, entered the premises and after viewing the same had an interview with the plaintiff in which the selling price was discussed. The plaintiff thereupon sent the purchaser's card to her employer, but the actual sale of the property was made through an established real estate broker and commissions were paid to him. On all the evidence, *held*, that the plaintiff was not entitled to commissions as she did not negotiate or consummate the sale.

*Held further*, that the plaintiff did not "produce" the customer as that term is used in such transactions.

Producing a purchaser is not synonymous with merely introducing a purchaser. To produce a purchaser implies some effort or activity in discovering him, for before he can be produced he must be found.

The plaintiff in forwarding the card of the eventual purchaser was merely performing her obvious duty to her employer.

*It seems*, that an established real estate agent may "produce" a purchaser although the latter voluntarily comes to his office to inquire about property; but the situation is different when an intending purchaser attracted by the appearance of the property makes inquiry of a janitor or caretaker and leaves his card to be forwarded to the owner. *Ellison v. Chappell*, 263.

3. *Contract of special employment construed — appeal — errors available in absence of exceptions.* A letter, by which the defendant states that "we understand from you that you are in touch with the representative of a prospective purchaser of picric acid" and "we are writing this letter to assure you that if the business which you are introducing to us on this occasion results in the making and carrying out of a contract for the supplying of picric acid to this prospective purchaser, we will set aside to pay over to you a commission," constitutes a contract of special employment, and the services of the person to whom the letter was written "in touch with the representative of a prospective purchaser" are of the essence of the contract, and the defendants cannot be held liable thereunder for commissions on a contract of sale procured through another broker introduced, by the one to whom the letter was written, to persons not in the contemplation of the parties at the time of the writing of the letter.

Errors in the interpretation of or instructions in relation to said contract by the court are available on appeal, even in the absence of exceptions. *McKellar v. American Synthetic Dyes, Inc.*, 371.

4. *Appeal — right of plaintiff where complaint dismissed at close of his case — action by real estate broker for commissions — effect of inability of vendor to execute valid conveyance.* A plaintiff whose complaint has been dismissed at the close of his case is entitled upon appeal to the most favorable inferences to be drawn from the evidence.

A real estate broker, employed to procure a purchaser ready, willing and able to take an assignment of a lease and to purchase furniture and stock upon the terms and conditions imposed by the vendor, who finds such a purchaser, is entitled to his commissions, although the contract falls through because the vendor had no authority from her lessor to make an assignment. The broker's right to compensation was not dependent upon an agreement with a purchaser being actually made, nor upon the ability of his employer to comply with the terms and conditions which she herself fixed. *Ritchey v. Murphey*, 429.

5. *Misrepresentation of authority to act as agent — election to hold as principal agent who misrepresents authority — attachment — moving papers — failure to embody evidence establishing agency.* Where a person falsely holds himself out as an agent of another the person with whom he deals may elect to hold him as a principal.

A plaintiff who seeks to sustain a warrant of attachment upon the ground that the person with whom the contract involved in the suit was made was an agent of the defendant, must not omit from his moving papers readily available evidence of the existence of the agency. *Pfaltz & Bauer Inc., v. Wiener*, 793.

When knowledge of agent not imputable to principal.

*See* VENDOR AND PURCHASER.

**PRINCIPAL AND SURETY.**

*See* GUARANTY AND SURETYSHIP.

**PRISONS.**

*Application by Prison Commission to compel board of supervisors to place lavatory and water closet in each cell of county jails.* Where the State Prison Commission upon approving plans submitted by a board of supervisors for the improvement of county jails imposed a condition that a separate lavatory and water closet be installed in each cell, but the board let the contract ignoring said condition, and at about the time of the commencement of the work the State Commission applied under section 52 of the Prison Law for an order to compel the board to conform to the condition imposed, which application was denied, but no restraining order was obtained or applied for by the Commission and the improvements have been completed, and it appears that the jails in question are to be used as detention jails only, and that in the men's department in each jail, no criticism having been made of the women's departments, there are provided four water closets and eight shower baths, the order of the Special Term denying the application of the Prison Commission should be affirmed. *Matter of State Commission of Prisons, 700.*

**PROCESS.**

*See* EXECUTION.

**PROVISIONAL REMEDIES.**

*See* ARREST.

*See* ATTACHMENT.

**PUBLIC HEALTH.**

*Advertisement by dentist constituting practice of denistry within meaning of statute — practice under false or assumed name — penalty — constitutional law — police power.* A duly licensed and registered dental practitioner caused to be printed in a public newspaper on three separate days an advertisement as follows: "Roofless, Gumless, Plate is an exclusive feature of King denistry. This natural, convenient and everlastingly comfortable plate cannot be had elsewhere. Ask for a free demonstration of its merits. It cannot drop, rock nor come loose. Absolutely invisible." And then appeared in large type the words "Dr. Hewson's (King) Dental Prices," followed by the advertised prices for various services in small type, and further on in the advertisement appeared the following: "Dr. E. L. Hewson's Dental Offices, formerly King Dental Offices, 50 Court Street," the words "King Dental Offices" being in much larger type than the rest of the sentence.

*Held*, that such advertisements constitute the practice of denistry within the meaning of the Public Health Law, section 190, as amended by chapter 129 of the Laws of 1916, and such practice will be deemed to have been conducted under a false, assumed or trade name in violation of section 203 of the Public Health Law, as amended by chapter 129 of the Laws of 1916, and chapter 507 of the Laws of 1917, rendering said dentist liable to a penalty of \$100 for each violation.

This provision of the Public Health Law is a valid exercise of the police power and became binding on said dentist even though it made that unlawful which before was lawful. *People v. Hewson, 212.*

Liability of manufacturer of food for injuries caused by deterioration.  
*See* NEGLIGENCE, 2.

**PUBLIC OFFICER.**

Reducing number of places trafficking in liquors.

*See* INTOXICATING LIQUORS, 1, 3.

Power of commissioner in New York city to direct water company to extend its system.

*See* NEW YORK CITY, 1.

**PUBLIC SERVICE COMMISSION.**

*Street railroads — reorganization — authority of Commission to order street railroad to reserve fund for maintenance and depreciation — authority to issue stock or bonds to provide for depreciation.* Under section 4 of the Public Service Commissions Law, providing that the Commission shall possess "all

**PUBLIC SERVICE COMMISSION** — *Continued.*

powers necessary or proper to enable it to carry out the purposes of this chapter," said Commission, in order to carry out a plan of reorganization of a railway company, having authorized the issue of stocks and bonds and consented to the execution of first real estate and refunding gold bonds and of adjustment mortgage five per cent income bonds subject to the first real estate and refunding mortgage, both of which provide that the company will keep its roads adequately equipped, etc., may order said company to reserve twenty per cent of its gross operating revenues, month by month, to provide for the maintenance and depreciation of its properties during the month.

Allowance for depreciation and obsolescence is a part of the operating expenses of a corporation.

A corporation has no authority to issue bonds or stock to provide for depreciation and obsolescence. *People ex rel. N. Y. R. Co. v. Pub. Serv. Comm.*, 338.

Order overruling demurrer to complaint.

See CERTORARI.

Right of railroad ordered to change its lines to allowance for expense of removing tracks and structures of other companies.

See RAILROAD, 2.

**RAILROAD.**

1. *Maintenance of highway* — Railroad Law, section 178, not repealed by Highway Law, sections 137 and 142a — *change of grade*. Section 178 of the Railroad Law, providing for the maintenance by railroad companies of the highway between and outside of the tracks, has not been impliedly repealed by sections 137 and 142a of the Highway Law providing for the construction of State or county highways through villages, and the fact that a village did not at the time of the improvement of a portion of a highway by the Highway Department, deem it advisable to have the other portion of the highway over which a street railroad was being operated improved, does not prevent it from subsequently compelling said street railway company to repair the street in compliance with its franchise and section 178 of the Railroad Law.

A change of grade at the crown of a street to an unstated amount is not a change of grade within the contemplation of the statute. *Village of Peekskill v. Putnam & W. Traction Co.*, 382.

2. *Right of railroad company, ordered by Public Service Commission to change and alter its lines, to allowance for expense of removing tracks and structures of other companies*. Where a railroad company, in order to make changes and alterations in its lines pursuant to a direction of the Public Service Commission under section 91 of the Railroad Law, is forced to shift and relocate the tracks of trolley companies and the sub-surface structures of a gas company and a water company, after unsuccessful efforts to come to an agreement with said companies, with the knowledge of the Public Service Commission which took no action therein, said railroad company is entitled to have the expense of relocating said tracks and sub-surface structures allowed and apportioned when the work was completed.

It is also entitled to an apportionment of the fees paid to corporation inspectors pursuant to section 391 of the Greater New York charter. *People ex rel. L. I. R. Co. v. Pub. Serv. Comm.*, 465.

Negligence — injury to brakeman.

See MASTER AND SERVANT, 3.

Injury to person waiting for car.

See NEGLIGENCE, 7.

Reorganization of street railroad — powers of Public Service Commission.

See PUBLIC SERVICE COMMISSION.

**REAL PROPERTY.**

1. *Mortgage containing no reference to restrictive covenants — purchaser on foreclosure takes free of restrictions — title marketable — when covenants are personal to grantor and do not run with land*. Where a realty company gave a mortgage on a certain lot containing no restrictive covenants as to



**REAL PROPERTY** — *Continued.*

the use of the premises and subsequently conveyed the lot, subject to said mortgage, by a deed containing restrictive covenants as to the building to be placed thereon, a purchaser on the foreclosure of said mortgage and his successor in title holding through a referee's deed containing no reference to the restrictions, takes the premises free of the restrictions, and, hence, one who has contracted to purchase from such grantee cannot refuse performance upon the ground that it was impossible to convey an unincumbered title.

Where only a portion of the lots sold by the realty company were subject to restrictive covenants and these were some distance from the lot sold on foreclosure, and there were no covenants on the part of the grantor or mutual agreements between the several lot owners creating easements, the restrictions will be deemed personal to the grantor and are not enforceable by the owner of lots acquiring title after the deed was given.

The rights of the realty company were extinguished by the foreclosure of its mortgage. *Patterson v. Johnson*, 162.

2. *Suit to compel specific performance of contract to give lease — memorandum of agreement too indefinite to support specific performance.* Suit for the specific performance of an agreement to make and deliver a long-time lease of real property. Written memorandum of alleged agreement to lease examined, and held, to be too vague and uncertain to support a suit for specific performance.

While parol evidence is admissible to explain ambiguities in a written memorandum and to explain the meaning of terms actually employed, it cannot be resorted to in order to supply an agreement with respect to matters concerning which there has been no meeting of the minds.

A provision of the memorandum for a renewal of the lease "at a reappraisal of 5% of the value at that time by experts" is insufficient to enable a court of equity to write a lease expressing the intention of the parties, as there is no provision as to who should select the experts, or how many experts there should be, or what should happen if the experts did not agree, and parol evidence is not admissible to show the intention of the parties as to these matters.

So, too, a provision that the plaintiff is "to improve the said property to the extent of no less than \$10,000," is too indefinite and uncertain to enable equity to decree specific performance of the contract to repair. *Weill Co. v. Creveling*, 282.

3. *Easements — method of acquisition — evidence — easement of necessity — prescription — adverse user — agreements between landlord and tenant — appeal — inconsistent findings — right of appellant to benefit of finding most favorable to him — estoppel.* In 1870, Nos. 15, 17 and 19 Irving place, in the city of New York, were separate dwelling houses, leased by their several owners to one tenant who connected the buildings using them as a hotel. In 1881, when the leases expired, Nos. 15 and 17 were leased to the same tenant who used them as a hotel, No. 19 being used as a private dwelling. This continued until 1890 when the three premises were again conducted as a hotel by one tenant and have so remained since that time. The tenant of the three premises has surrendered his lease of Nos. 17 and 19 to the owner and given him permission to erect a partition wall, which would cut off premises No. 15, owned by another party, from premises Nos. 17 and 19. It appears that structural changes can be made to restore No. 15 to the condition in which it was prior to 1870, and that the whole property is capable of being separated into its original units and full enjoyment of a separate use obtained. In a suit by the owner of premises No. 15 against the owner of premises Nos. 17 and 19, evidence examined, and

*Held*, that the owner of No. 15 has acquired no easement in the use of the facilities in Nos. 17 and 19, either by grant express or implied, by estoppel or prescription, nor is said owner entitled to equitable relief preventing the erection of the partition wall.

There must be a reasonable necessity as distinguished from mere convenience in order to establish an easement of necessity.

Except in the case of certain relations that are recognized and enforced in equity, in analogy to the principles of law applicable to easements, an easement can be created only by a grant express or implied, or by pre-

**REAL PROPERTY — Continued.**

scription, and the latter, as modified by the modern doctrine, rests upon the presumption of a grant.

The modern law of rights acquired by prescription rests upon the adverse user, for which no permission can be shown, for such a length of time that a grant will be presumed, which has been lost. In other words, adverse user will ripen into an easement, as adverse possession would establish a title and upon the same theory of law.

Although a tenant or succeeding tenants may by adverse use of property for the statutory period create prescriptive rights in adjoining property which will inure to the benefit of their landlord, there is no adverse user by the tenant of a lot when he uses two adjoining lots with the express permission of the owner thereof, and still less is there an adverse use by the tenant of the one lot of the two adjoining lots when any use of the latter was made by the tenant of the one lot under a lease of the other lots which gave him express permission to make such use.

A tenant cannot hold adversely to or prescribe against his landlord.

Where findings are inconsistent an appellant is entitled to the benefit of the one most favorable to him.

Separate agreements by owners of several lots, with a tenant, as to the use thereof, are limited to the term of the agreements and the parties thereto and cannot be extended without a new agreement, nor can they inure to the benefit of any one except the parties thereto, their personal representatives or assigns.

Estoppel can only arise where a person has changed his position with relation to or expended money upon his property, relying upon an existing easement in the adjoining property, and without which the act done or the expenditure would have been useless, and the adjoining owner has not interposed to forbid or prevent it.

In order to fasten a limitation upon the free right which each man has to use his property as he desires, and to convey it free from restrictions, except such as he himself imposes, there must be clear and explicit agreement establishing the other's right showing the intention of the person so permanently to burden his property. *Olin v. Kingsbury*, 348.

4. *Dower — when widow estopped as against bona fide purchasers — rabbinical divorce — rights of grantees of bona fide purchasers.* Where a wife, as complainant, procures a rabbinical divorce, acquiesces in the remarriage of her husband, and is herself subsequently remarried and lives with her second husband for twenty-three years, she is estopped from claiming dower in the lands of her first husband which had been conveyed by him to *bona fide* purchasers by deeds in which his second wife joined, releasing her dower.

Grantees of such *bona fide* purchasers have all the rights of the original grantees from the plaintiff's divorced husband, and need not show their personal reliance upon his apparent marital status. *Kantor v. Cohn*, 400.

5. *Assignment of rents as collateral security — prior mortgage of same property and subsequent assignment of rents arising therefrom to assignee of mortgage as collateral security — priority of claim to rents — assignment of rents not a conveyance or incumbrance within the meaning of the Recording Act.* Where an owner of property, after executing and delivering a bond and mortgage thereon, assigned to the plaintiff the rents accruing from the same property as security for an indebtedness, and expressly authorized him to collect such rents as have accrued until the satisfaction of his debt, and the mortgagee on the date of the mortgage assigned the same to the defendant, and after the assignment of rents to the plaintiff the owner also executed and delivered to the defendant an assignment of the rents and profits arising from said property as security for the sum secured by the bond and mortgage, the plaintiff is entitled to priority of payment out of the rents.

An owner of real property may lawfully assign the rents to accrue and grant the reversion to another.

The fact that the assignment of the rents to the plaintiff was not recorded until after the mortgage and the assignment of the rents to the defendant were made is immaterial, because the assignment of rents was not a conveyance nor an incumbrance upon real property, and was, therefore, not within the Recording Act.

**REAL PROPERTY** — *Continued.*

The defendant was not entitled to the rents because he held a mortgage upon the property, nor because of a provision in the mortgage entitling him to the rents in case of default, there being no evidence that any such default had occurred when the rents sought to be recovered were collected. Nor does the fact that the defendant was in possession solely by permission of the mortgagor when he collected the rents give him a right thereto. *Conley v. Fine*, 675.

Right of life tenant to possession and management of estate.

See DECEDENT'S ESTATE, 3.

Acceptance of highway — dedication — abandonment of portion — ownership of title.

See HIGHWAY.

Contract between city and construction company — right of abutting owner to sue upon contract.

See MUNICIPAL CORPORATION.

Damages by change of grade of street — review of award.

See NEW YORK CITY, 3.

Injury to adjoining easements by encroachment of public bath upon street.

See NEW YORK CITY, 4.

Action to determine claim — mode of trial.

See PRACTICE, 3.

Broker's action for commissions — failure to show purchaser was willing and able to perform.

See PRINCIPAL AND AGENT, 1.

Broker's action for commissions on sale — evidence not justifying recovery.

See PRINCIPAL AND AGENT, 2.

Broker's action for commissions — effect of vendor's inability to execute valid conveyance.

See PRINCIPAL AND AGENT, 4.

Jurisdiction of equity to restrain trespass.

See TRESPASS.

Suit for specific performance of contract to exchange lands.

See VENDOR AND PURCHASER.

Rights in land under New York bay.

See WATER AND WATERCOURSES, 1.

See LANDLORD AND TENANT.

See PARTITION.

**RECEIVER.**

Appointment in foreclosure proceedings — notice of application.

See MORTGAGE, 3.

Appointment of receiver — insufficiency of moving papers.

See PARTITION.

**REPLEVIN.**

Constructive possession — appeal. *Parish v. Neil*, 965.

**REVISED STATUTES.**

See STATUTES.

**ROAD.**

See HIGHWAY.

**RULES.**

[For table of General Rules of Practice cited and construed in this volume, see *ante*, p. lxxxv.]

**SALE.**

1. Action for breach of contract — failure to make prompt shipment — counterclaim by purchaser for loss from rescission of contract for resale — failure of vendor to make prompt delivery under one contract no excuse for purchaser's rejection of tender under another contract made at same time. In an action for breach of contract of sale it appeared that the plaintiff on

**SALE — Continued.**

April eleventh made a written contract to sell the defendant several tons of steel scrap; that the defendant resold the steel and the plaintiff had knowledge when he made the contract that the defendant had sold or expected to resell. The contract read "shipment to be made prompt." It appeared that in the trade "prompt" shipment required shipment within thirty days. Plaintiff made shipments on May third and fifth, but no other shipments being made the defendant, after urging by mail the necessity of prompt delivery, canceled the contract on May thirteenth, because of delay. The parties also made a separate contract whereby the plaintiff sold to the defendant several tons of annealing pots, the contract providing for "shipping instructions when the material is ready to be loaded;" that on April twenty-eighth plaintiff requested shipping instructions which were not given and subsequently renewed its tender but defendant refused to accept.

*Held*, on all the evidence, that the plaintiff was guilty of an inexcusable breach of its contract to deliver the steel scrap, but that the defendant is liable for the purchase price of the carload of steel shipped on May fifth, for which it had not paid, and for damages for not accepting the annealing pots.

"Prompt" shipment means expedition and admits of less delay than would be permissible under a contract to make delivery within a reasonable time.

The plaintiff's breach of contract in respect to the steel scrap did not constitute a sufficient reason for the rejection of the annealing pots, as the contracts were separate.

Since the defendant resold the steel scrap with reference to the plaintiff's contract, and the vendee rescinded because of delayed shipments by plaintiff, the defendant was entitled to counterclaim for loss of profits on the resale. *Dozey v. Coates, Bennett & Reidenbach, Inc.*, 207.

2. *Statute of Frauds* — oral contract to deliver merchandise of more than fifty dollars in value — effect of fraudulent representation by seller that it would perform contract without reducing same to writing — pleading — complaint — sufficiency of allegations as to fraud. An oral contract to deliver merchandise of the value of more than fifty dollars, unenforceable under the Statute of Frauds, cannot be enforced upon the ground that the seller fraudulently represented that it was not necessary to put the contract in writing, as it would be in fact performed, the purchaser having surrendered no rights by reason of such fraudulent statement.

Complaint in an action for breach of such a contract, alleging that the fraudulent promise without intent to perform the same was made for the purpose of inducing the plaintiffs not to purchase stock elsewhere, is defective for failure to allege more fully the facts and circumstances upon which such charge of fraudulent motive is based.

The mere allegation of fraud is not enough; the facts and circumstances showing it should be alleged, with a characterization of their fraudulent purpose. *Steiner v. American Alcohol Co., Inc.*, 309.

3. *Breach of contract* — action to recover payments upon theory of abandonment and rescission by seller — evidence — appeal — effect of directed verdict. A corporation promised to obtain guarantors for the performance of a contract to purchase machinery of the defendant of the value of about \$38,000, but upon failure to obtain such guarantors the contract was modified permitting the corporation to pay \$5,000 in cash at once, which it did, and to make further payments before the property was delivered. No guarantor was furnished and no further sums were paid and the defendant did not make delivery. In an action by receivers of the corporation to recover the \$5,000 upon the theory that the contract was abandoned and rescinded, evidence examined, and

*Held*, that findings that the defendant had made default in performance, and that plaintiff had duly performed all conditions precedent, should be reversed and a new trial granted.

A motion for a directed verdict is simply a submission to the court to decide the facts as well as the law, and a decision of fact so made is subject to review and should be reversed if against the weight of evidence. *Trundle v. Beggs & Co.*, 314.

**SALE — Continued.**

4. *Statute of Frauds — memorandum in writing — acceptance by parol — sale — action by vendee for breach of contract — evidence.* A definite offer in writing signed by a vendor is sufficient to charge him, even though the acceptance be by parol.

Hence, in an action by a vendee under an executory contract for the sale and delivery of skins to recover damages for the failure of the vendor to perform, there being a sufficient memorandum in writing signed by the defendant, within the Statute of Frauds, it was competent for the plaintiff to show a parol acceptance given by the defendant on the same day.

Since there was no reference in the contract to a sample, the action cannot be sustained on that theory.

As the contract was indefinite with respect to the grade or quality of skins, and there was no evidence with respect to the manner in which such skins are dealt in or with respect to any custom, a verdict on the basis of a market price considerably higher than the minimum price, depending on the grade or quality of the skins, should not be permitted to stand. *Kohn & Baer v. Ariowitsch Co., Inc.*, 415.

5. *Action by purchaser for failure of defendant to deliver merchandise — defense — inability to make shipment because of war conditions — erroneous charge as to duty of purchaser to go into open market and actually purchase the merchandise.* Where in an action by a purchaser of Manchurian garlic, for the failure of the defendant to deliver the same, the defendant claimed that it was unable by reason of war conditions to have the goods shipped, and that it is relieved from liability under the provision of the contract that if the seller is unable to make shipment on account of the embargo against the exportation of food products or other unavoidable delays beyond control, the contract is void, and the court charged that it was the duty of a party under similar circumstances to go into the open market and buy and charge the defendant simply for the balance, it was reversible error to refuse a request to charge further that the law does not require the purchaser to go into the open market and actually purchase the merchandise, as the jury might have understood from a refusal to so charge that the court had intended that the plaintiff could not have any recovery if he did not go into the open market and buy. *Kirsch v. Pacific Commercial Co., Inc.*, 614.

6. *Action for balance due for goods sold and delivered — defense — fraudulent misrepresentation by seller as to cost.* A representation that goods offered for sale had cost the seller a certain amount is a representation of fact and not an expression of opinion and if it was false and was fraudulently made and relied upon by the buyer it furnishes a basis for a counterclaim in an action by the seller to recover a balance alleged to be due. *Nanes v. Peck & Mack Co.*, 760.

7. *Suit for breach of contract to sell and deliver goods — trade custom — delivery of bill of lading equivalent to delivery of goods — issue as to time within which bill of lading could be delivered — conflict of testimony — when complaint should not be dismissed as matter of law upon ground that action is prematurely brought.* Where in an action brought to recover damages for a breach of the defendant's contract to sell and deliver certain metal during a certain month it appeared that, according to the custom of the trade, such contracts were fulfilled by delivering bills of lading of the goods to the purchaser and that such delivery was treated as delivery of the merchandise itself, and there is a conflict of evidence as to the length of time it would take a bill of lading to reach the plaintiff by mail from the shipping point of the goods, it was error for the court to dispose of this question of fact as a matter of law and to dismiss the complaint upon the ground that the action was prematurely brought. *Pope Trading Corporation, Inc., v. Culler*, 798.

Transfer of business and good will — suit to enjoin use of trade name.

See INJUNCTION.

Waiver of time of payment.

See PLEADING, 5.

**SCHOOLS.**

Salary of teachers — judgment.

See NEW YORK CITY, 5.

**SESSION LAWS.**

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lxxx.]

**SHIPS AND SHIPPING.**

Liability of owner for injury to mate.  
See NEGLIGENCE, 10.

**STATUTES.**

[For tables of the Session Laws and Statutes cited and construed in this volume, see *ante*, p. lxxv *et seq.*]

**STAY.**

Authority of court to stay foreclosure.  
See CORPORATION, 6.

When motion not granted — cause not at issue.  
See PRACTICE, 1.

Legal action not stay pending equity suit.  
See PRACTICE, 2.

**STREET.**

Use of streets for electric wires — franchise from municipalities — estoppel.  
See CORPORATION, 5.  
See HIGHWAY.

**SURROGATE.**

*Practice — default of contestants on probate — opening default.* Where contestants of a will offered for probate in the Surrogate's Court did not voluntarily change their counsel, but were abandoned by him on the eve of trial after the filing of objections on their behalf, their motion to open a decree of probate entered on their default should be granted. *Matter of Wolfe*, 35.

**TAX.**

1. *Foreign bank stock owned by deceased non-resident — agreement of foreign legatees for private settlement of estate — when such agreement continues executors and trustees in their representative capacity — when shares of stock which will go to deceased non-resident legatee not taxable in this State.* Where the legatees of a testator who died a resident of a foreign State, who are themselves non-residents, entered into an agreement with the executors and testamentary trustees wherein it was recited in substance that a private settlement of the estate was preferred to a judicial settlement thereof, and that the executors and trustees should set aside securities to pay annuities "in accordance with the terms of said will," and should form the trust estate thereby created and should convert the assets of the estate into money or otherwise manage the same so that ultimately a division could be made among the residuary legatees as the condition of the estate would warrant, and that the trustees who held sundry securities of a character which might not be approved by the court or authorized by law as investments, might retain such securities as in their judgment they might deem for the interest of the estate and to invest or reinvest the proceeds of such securities and should not be liable for any loss or depreciation which might occur unless from their fraudulent misconduct or default, etc., and the trustees, holding stock of a national bank in this State upon which they paid a transfer tax, sold the same and subsequently bought similar stock of the same bank which they held as assets of the estate, the proportionate share of the value of said stock or the amount thereof which might be distributed to one of the residuary legatees is not subject to a transfer tax in this State on the death of said non-resident legatee. This, because under the agreement the executors and trustees continued to hold the estate as representatives of the testator and not as agents of the legatees, and the share of said stock which would go to the legatee was a mere chose in action in favor of one non-resident against another and is not taxable in this State.

Said stock is not subject to taxation although the executors of the testator now propose to make a distribution among the legatees in specie instead of selling the stock and distributing the proceeds. *Matter of Phelps*, 82.

**TAX — Continued.**

2. *Telegraphs and telephones — taxation of franchise of telegraph company incorporated under chapter 265 of the Laws of 1848, as amended — effect of granting of subsequent license to said company under Post Roads Act — enforcement of collection of tax.* The right granted by the State to a telegraph company incorporated under chapter 265 of the Laws of 1848, as amended, to occupy the streets and navigable waters within the limits of the city of New York, constitutes a special franchise taxable as real property under the Tax Law.

A license given to said company under the Federal Post Roads Act to use the facilities which had been granted by the State, and giving the further right to extend such facilities upon the post roads in other States, gave to said company no property rights in the streets and did not destroy the special franchise granted by the State, but supplemented it, and, therefore, did not affect the right of the State to tax said franchise.

The enforcement of the tax on such a special franchise, pursuant to section 306 of the Tax Law by sequestration or by action at law, will not violate the Post Roads Act. *People ex rel. Postal Tel.-C. Co. v. Bd. Tax Comrs.*, 777.

Transfer tax on transfers by deed in execution of power of appointment.  
See WILL, 2.

**TELEGRAPHS AND TELEPHONES.**

*Failure of telegraph company to forward message — refusal of sender to tender exact amount of charges.* A plaintiff is not entitled to recover damages for the failure of the defendant telegraph company to forward a telegram respecting the place where the plaintiff's mail was to be sent, where it appears that the plaintiff, having in change the exact cost of the telegram, refused to pay the same over because one of the coins was a Columbian half dollar which had a premium value to collectors of five or ten cents, but insisted on the defendant's agent changing a five-dollar bill which the agent refused to do.

The plaintiff cannot recover the amount of his hotel bill at a certain city, where it is conceded that he intended to stay there, at least part of a day in any event. *Dale v. Western Union Telegraph Co.*, 292.

Validity of incorporation as telegraph company — collateral attack.  
See CORPORATION, 5.

Taxation of franchise of telegraph company.  
See TAX, 2.

**TITLE.**

See REAL PROPERTY.

**TORT.**

See CONVERSION.  
See FALSE IMPRISONMENT  
See FRAUD.  
See LIBEL.

**TRESPASS.**

*Jurisdiction of equity to restrain trespass — when mandatory injunction granted — object of proceedings in civil courts.* The unquestioned jurisdiction of equity to restrain a trespass is sparingly used and the trespass alone is insufficient to invoke it.

If a trespass consists of a structure or of materials so placed on the land that relief cannot be had by execution on a judgment in ejectment, and the injury is irreparable and cannot be compensated in damages except through multiplicity of actions, it may be restrained by mandatory injunction.

The rule that only in cases where the remedy at law is inadequate will equity interfere, has lost none of its vigor.

Although defendants have willfully and wantonly entered on plaintiff's land and taken therefrom a quantity of cement sand and filled in the excavation with stones, garbage, ashes, refuse and other materials, they should not be required by a mandatory injunction to remove the sand and refill the excavation with the same sand or sand of equal quality, where it appears that the sand removed is worth only \$625, for the value of which the plain-

**TRESPASS — Continued.**

tiff had a complete remedy at law; that compliance with the injunction will cost the defendant over \$3,000 or about the value of the lots, and that the return of the sand will not be of substantial value to the plaintiff.

The object of proceedings in the civil courts, except in cases where punitive damages are allowed, is not punishment of the defendant, but redress for the plaintiff. The remedy should, therefore, be so shaped that there is some reasonable relation between the burden placed on the defendant, and the benefit to the plaintiff. *Donovan v. Kissena Park Corporation*, 737.

Removing employee's goods. *Lamb v. Cheney & Son*, 960.

**TRIAL.**

1. *Action by citizen and resident of Germany against citizen of United States — continuation of action by personal representatives of deceased plaintiff — abatement — suspension of Statute of Limitations during war.* Where, in an action commenced on May 12, 1914, by a citizen and resident of the German Empire against a citizen of the United States residing in Chicago, upon a cause of action arising in said city, jurisdiction was obtained by attaching a claim of the defendant against a domestic corporation having its place of business in the county of New York, and the defendant appeared and answered, and a reply was served on October first, and the cause of action placed on the calendar for trial, where it still remains, and it appears that the plaintiff died in Germany in July, 1915; that no application has been made to substitute personal representatives to prosecute the action; that plaintiff did not write for the documents necessary to apply for ancillary letters or to enable personal representatives to be substituted as parties plaintiff until more than sixteen months after the plaintiff's death, he has failed to show the diligence which should be exercised, and an order should be granted that the action abate unless it be continued by the personal representatives of the deceased within one year.

The fact that the defendant has given a bond does not affect the circumstances as he is put to unnecessary expense by the continued delay.

The abatement of the action will not deprive the personal representatives of ability to prosecute the same after the war is over, if they are so advised.

The Statute of Limitations is suspended during the war as between the citizens of belligerent powers.

The fact that the action cannot be prosecuted during the period of the war is no reason why the personal representatives of the plaintiff should not demonstrate their intention of prosecuting it as soon as possible. *Farenholtz v. Meinhausem*, 474.

2. *Place of trial — rule as to residence of railroad companies not applicable to other domestic corporations — change of place of trial.* The rule that railroad companies are deemed to reside in each of the counties through which their roads run, within the meaning of section 984 of the Code of Civil Procedure relating to the place of trial of an action, does not apply to other domestic corporations having a principal office as fixed in their certificates of incorporation, and branch offices in other counties where they transact a part of their business.

Motion to change place of trial to county where defendant resides granted upon the ground that neither the plaintiff corporation nor defendant resided in the county where the venue was laid at the time of the commencement of the action. *General Baking Co. v. Daniell*, 501.

3. *Erroneous direction of verdict upon the merits for defendant — evidence — admissions — admissibility against defendant of copy of judgment roll in prior action — action upon agreement for discharge of all collateral — evidence as to position and duties of representative of defendant who executed said agreement.* A direction of a verdict in favor of the defendant upon the merits is erroneous where there is no evidence to establish such right of the defendant.

An answer produced from the judgment roll in a prior action against a defendant corporation is admissible as an admission against it and the officer who verified the same, although it was a copy.

In an action against a surety company under an agreement for the discharge of collateral deposited as security for a bond, it is error to refuse to allow the plaintiff to show that the person who executed the agreement for the



**TRIAL** — *Continued.*

defendant had a desk in its office, what names were on the door of the room and what duties said person performed. *Crombie v. Illinois Surety Co.*, 787.

4. *Distinction between substantial and harmless error — when failure to observe legal rules will not vitiate trial — when exclusion of testimony harmless — criminal procedure — when district attorney exceeds rights in opening address to jury — evidence — remark of bystander as part of res gestæ.* The dividing line between substantial error which calls for a reversal of a judgment of conviction in a criminal action and such error as may be disregarded, depends in large measure upon the conviction in the minds of the reviewing judges of the defendant's guilt.

If from the evidence in the criminal action the defendant's guilt clearly appears, a failure to strictly adhere to legal rules will not vitiate the crime.

While upon a trial for homicide a question to the very young son of the victim, who witnessed the murder, why he had not told the policeman at the arrest of the defendant that he was the man who shot his father, was proper, yet in view of the natural fear in the minds of young children of the officers of the law, his failure to tell the policeman is so immaterial as to be negligible and the exclusion of the testimony is harmless.

A district attorney exceeds his rights when in his opening he states matter as proof of a motive in defendant to commit the crime charged, which he cannot prove, cross-examines defendant on collateral issues to an undue extent, and on issues entirely irrelevant to the question of defendant's guilt of the crime for which he was on trial; but such acts are not prejudicial error calling for the reversal of a judgment of conviction, where the jury was instructed that no motive for the crime had been proved.

Evidence of the remark of a bystander that he, meaning defendant, "ran over Houston street" was admissible as part of the *res gestæ*, the crime and the immediate flight being necessarily linked together. *People v. De Simone*, 840.

Suit to reform lease — burden of proof.

See EQUITY.

Reopening case — proof must follow pleadings.

See LIENS, 1.

Malicious prosecution — probable cause for court.

See MALICIOUS PROSECUTION, 1.

Action for personal injuries — challenge of juror.

See NEGLIGENCE, 12.

Indefinite postponement because witness is in Germany.

See PRACTICE, 4.

**TRUST.**

1. *Individual liability of trustee in control of tenement house for negligence in making repairs.* A person who, as trustee of a tenement house, causes the stairways to be improperly and negligently repaired and then lets that condition grow into a further defect whereby a tenant is injured, is not shielded from personal liability by reason of his trusteeship. Although his opportunity to do such things came from his trusteeship, his negligent doing was an individual misfeasance, giving a cause of action against him personally. *Trani v. Gerard*, 387.

2. *Application and limitation of rule that corpus of trust is to be maintained unimpaired — apportionment of proceeds of sale of right of trustees holding stock to purchase increased capital stock between principal and income — consent by beneficiary to the borrowing of money by trustees — election.* The rule in *Matter of Osborne* (209 N. Y. 450), that the principal of a trust invested in corporate stock is to be maintained unimpaired and the remainder awarded to the life beneficiaries, is intended to be applied in a case where the surplus of the corporation or some part thereof is distributed by dividends in cash or stock, or where in liquidation of the corporation's business its assets are sold and the proceeds distributed among the stockholders, or where the corporation purchases the stock from the trustees, thereby in effect causing a partial liquidation of the assets.

**TRUST — Continued.**

Said rule should be limited to those cases in which there is such a distribution of surplus.

The reason for the rule is that the surplus of the corporation represents accumulated income.

New shares of stock purchased by trustees in the exercise of subscription rights given to the stockholders and the proceeds of the sale of such subscription rights are capital of the trust estate to which the life beneficiary is not entitled. There is no distribution of surplus in such a case.

Hence, where a corporation increases its capital stock and gives its stockholders of record the right to subscribe for the new stock at par ratably in proportion to their holdings, but such rights are not accompanied by any cash or stock dividend, trustees holding stock of said corporation in trust, who did not exercise the right to subscribe for the increased stock but sold said rights, properly credited the sum realized to the principal of the trust.

A beneficiary, who objected to a sale of sufficient stock held in trust for the purpose of paying a legacy and expenses of administration and consented to the trustees borrowing the sum required, is not entitled to object to the account of the trustees upon the ground that her income has been thereby diminished to the advantage of the principal, she having made an election which she cannot withdraw. *Baker v. Thompson*, 469.

Testamentary trust — apportionment of stocks of Standard Oil subsidiaries between capital and income.

*See DECEDENT'S ESTATE*, 7.

Suit to impress trust and for an accounting.

*See DEPOSITION*.

Creation of trust without words of gift to trustees.

*See WILL*, 1.

Action by remainderman for waste.

*See WILL*, 3.

Suspending power of alienation.

*See WILL*, 4, 5.

When corporate stock constitutes part of corpus rather than income.

*See WILL*, 7.

**UNITED STATES.**

[For tables of sections of the United States Constitution and Statutes cited and construed in this volume, see *ante*, p. lxxv and p. lxxvi.]

**VENDOR AND PURCHASER.**

*Suit for reformation of contract to exchange properties and for specific performance — evidence — notice of restrictions upon property — principal and agent — when knowledge of agent not imputable to principal.* In a suit to reform a contract for the exchange of properties made between the plaintiff and the defendant, and for the specific performance of the contract as reformed, it appeared that the parties were to give full covenant deeds. It was claimed by the defendant that there were restrictions upon the plaintiff's property so that it could not give a full covenant deed, but the plaintiff claimed that the parties had knowledge of these restrictions at the time the contract was made, and by inadvertence they were not included therein. The alleged restrictions consisted of a covenant that all the buildings on plaintiff's lots should set back twenty-five feet, and that no building should be erected to cost less than a certain amount.

*Held*, on all the evidence, that it is inconceivable that if said restrictions existed and the facts were known to the plaintiff and its attorneys, the contract could have been drawn by counsel providing for a full covenant deed without excepting said restrictions; that, therefore, a judgment dismissing the complaint upon the merits should be affirmed.

The fact that defendant's agent saw plaintiff's property before the contract was made, and that the lots were uniform in size and the buildings thereon a uniform distance from the road was not notice to the defendant of the restrictions upon the lots, neither was the knowledge of the broker, who represented both parties, imputable to the defendant.

Actual intention can only be judged by actual knowledge, not by constructive knowledge.

**VENDOR AND PURCHASER** — *Continued.*

Where notice is a relevant fact, it cannot be imputed to the *defendant* for the purpose of ascertaining what in fact was the intention of the *defendant* at the time the contract was made.

As the complaint charges knowledge of the restrictions, and an intent to provide for them in the contract, and asks for a reformation to that extent, and includes no offer to make compensation for the defects, the judgment cannot be reversed on the ground that the defects have been waived and specific performance can be decreed with compensation. *Fliss Realty Corp. v. Charter Construction Co.*, 610.

Deed — breach of condition subsequent — re-entry.

See HIGHWAY.

Breach of agreement to convey land — counterclaim.

See PLEADING, 4.

Broker's action for commission — failure to show purchaser was willing and able to perform.

See PRINCIPAL AND AGENT, 1.

Broker's action for commissions on sale — evidence not justifying recovery.

See PRINCIPAL AND AGENT, 2.

**VILLAGE.**

Enjoining village from polluting water.

See WATER AND WATERCOURSES, 2.

**WAIVER.**

Irregularity on trial.

See CRIME, 4.

**WATER AND WATERCOURSES.**

1. *Rights in land under New York bay — navigation within bulkhead line — right of owner to fill in land under water — privately owned land under public water subject to navigation and to the municipal law — authority of commissioner of docks to authorize construction of temporary structures at request of Federal government — injunction.* An owner of land under water extending into New York bay has the right to build a pier in front of its upland, but through its private ownership has no right to lateral waters over the land of adjacent proprietors.

Its private right of use is limited to the front of its shore or its extension into public waters. Whatever right it has to participate in public waters is subject to the vicissitudes of public regulation.

Navigation within the bulkhead line in New York bay may continue only to such time as the littoral owner avails itself of the right to fill in its land to the bulkhead line.

An owner of land under New York bay has no right to enjoin an owner of lateral waters from filling into the old bulkhead line, nor to enjoin the construction of basins therein for the harborage of vessels to meet the present national exigencies due to the war.

Section 819 of the Greater New York charter gives the commissioner of docks specific power to change pier head lines in specified places, but no general authority is conferred upon him to change bulkhead lines, even temporarily.

With the approval of the sinking fund commission, the commissioner of docks can even change bulkhead lines, and where there has been accordingly concerted a plan that takes away from a littoral owner some 600 feet of the land that since 1857 could have been filled in by said owner or its predecessor, and the proposal is to confine the temporary structures within the old bulkhead to aid in meeting the nation's greatest exigency with all of the waters from the old bulkhead line unincumbered, a temporary injunction should not be granted in the absence of full proof of legal injury to a littoral owner.

Privately owned land under public waters is subject to the navigation of vessels over it, but cannot be appropriated by others to enlarge the berths at private piers.

**WATER AND WATERCOURSES** — *Continued.*

Whether public waters are within bays or the three-mile limit on the open sea, they are subject to the municipal law within the exercised paramount right of Congress to regulate commerce, and the State, through the Legislature within such limitation may confer an exclusive privilege in tide waters or authorize a use inconsistent with the public right.

The commissioner of docks vested by the State with the control and government of waters under New York bay, being asked by the Federal government to provide a basin for the protection of neutral vessels, may authorize temporary structures within a limited area for such purpose, although the slip spaces previously given to an adjoining owner on either side of its pier by the sinking fund commission are thereby encroached upon, it appearing, however, that such owner will suffer no infringement of its private rights or property. *Consumers Coal & Ice Co. v. City of New York*, 388.

2. *Suit to enjoin village from polluting water, running in open ditches through plaintiffs' land, by introduction of sewage therein, and from causing said ditches to overflow* — open ditches may constitute watercourses to which rights of riparian owners attach — right to discharge surface water — pollution of fresh water streams. In a suit to enjoin a village from polluting water running in open ditches through the plaintiffs' farm by the introduction of sewage therein and from collecting from its paved streets through its sewer system water and sewage in such quantities as to overflow the plaintiffs' land under cultivation, and to recover damages, it appeared that part of the plaintiffs' farm consisted of low land, which had been wet and swampy, and was drained by open ditches which had existed as such for many years, and that the defendant's sewer system opened into these ditches.

*Held*, on all the evidence, that the main ditch through plaintiffs' land overflowed its banks and injured the plaintiffs' crops owing to the fact that the defendant, through its sewer system, overtaxed the capacity of the ditch;

That the defendant permits sewage to pollute the waters passing through the plaintiffs' lands, which should not be permitted to continue;

That a judgment dismissing the complaint on the merits should be reversed and a new trial granted.

Open ditches constructed to drain low lands and used for many years for such purpose become watercourses, and the owners of the land through which they run are entitled to the same benefits and are subject to the same burdens as attach to riparian owners on ordinary watercourses.

Such riparian owners are obligated to keep free and unobstructed the watercourses through their lands.

Surface waters may be collected and discharged in such a watercourse, but not in such quantities as to overflow the banks.

Fresh water streams may not be polluted. The right to pollute such streams may not be acquired by prescription or lapse of time. *Lumley v. Village of Hamburg*, 441.

**WILL.**

1. *Gift with subsequent provision postponing time of enjoyment* — creation of trust without words of gift to trustees — power in trust with power of sale. Where a testator, having given his wife one-third of the income of his estate for life, gave all his real and personal property to his son, save the reservation of income made to the wife, but in a subsequent clause provided that the son, on reaching his majority, should receive \$10,000 from the estate to start in business, together with two-thirds of the income, and that on attaining the age of twenty-eight years he should receive the rest of the property and its increase upon adequately securing the income of the widow, the latter clause postponing the gift of the whole estate to the son is not invalid or ineffective on the theory that it was an attempt to cut down the previous absolute gift to the son. The latter clause does not cut down the son's estate, but merely postpones the time when he shall be entitled to possession of the property.

Where the testator appointed his wife and another person as executrix and executor of the will and appointed them trustees to carry into effect the provisions of the will and endowed them with a power of sale, a valid trust is created, although the estate was not in terms given to the executors in trust. The devise to the executors is implied.

**WILL — Continued.**

Even if such will were construed as creating the power in trust instead of a trust estate the result would be the same as the executors were given a power of sale. *Morss v. Allin*, 79.

2. *Construction — vested remainder — tax — transfer tax on transfers by deed in execution of power of appointment.* Where a testator who died in 1876 devised certain lands to his son for life, with authority to appoint said lands among his issue or his sisters by deed or will, and, in case the son should leave no valid appointment or issue, devised the lands to his sisters, the sisters had a vested interest, which is not subject to a transfer tax.

Transfers by deeds executed three years prior to the death of the grantor in pursuance of a power of appointment in the will of his father who died before any statute in this State imposed an inheritance or transfer tax, are not subject to a transfer tax.

Such transfers, not being dependent on or connected with death, are clearly without the legislative intention, and beyond the purview of the statute. *Matter of Wendel*, 126.

3. *Law of State of New Jersey — when grandson of testator takes interest which will support action for waste against life tenant — form and amount of bond — costs.* A will placed the residuary estate in trust with the direction that one-third of the income be paid to the widow and the residue in equal portions to the testator's children with power in the widow, while living, to receive and apply the share of a minor child to his maintenance and education. It was provided that in case of the widow's death before the division of the property the entire net income was to be paid in equal portions to the children for support and education until the youngest reached majority, at which time the residuary estate was to be divided into three parts, one transferred to the widow in trust for herself and children for life, the remaining two-thirds to be transferred to the children equally, the issue of any deceased child to take the parent's share *per stirpes*. It was then provided that in case the widow died before the time for division, the trustee should then divide the whole estate equally among the children, the issue of deceased children to take their parent's share *per stirpes*. It was further provided that if the widow survived the first division, upon her subsequent death, the part of the residue estate held in trust for her should go to the children equally, the issue of a deceased child to take *per stirpes*.

*Held*, that under the law of the State of New Jersey by which the will is governed, a grandchild of the testator, whose father died after the first division of the estate, had such an interest therein as entitles him to maintain an action for waste against the widow who is still surviving, and this irrespective of whether his interest is indefeasible or not.

In such action for waste the trustee should not be required to give a bond to secure the payment of a fixed sum to the plaintiff, nor should it be found that a fixed sum will be due; the bond should secure the plaintiff against loss for such sums as the widow has wasted or may hereafter waste.

The costs of the action should not be paid out of the estate by sale of assets or otherwise, but should be charged to the defendants personally. *Smith v. Smith*, 166.

4. *Trust — suspension of power of alienation — when codicil extending trust for third life may be disregarded.* Where the general scheme of a will contemplated a trust for the lives of the testator's wife and daughter, but was subsequently extended by a codicil so as to include the life of a son-in-law if he survived his wife, the provision for the son-in-law may be disregarded in so far as it extends the trust for the third life in violation of the statute, and the remainder of the trust declared valid, the original scheme of the will being thereby left intact. *Matter of Abbey*, 395.

5. *Construction — unlawful suspension of power of alienation for period of years — vesting of fee in heirs as tenants in common.* The will of a testator, survived by his widow and three daughters, provided that the widow should receive a certain annuity during life in lieu of dower, and that the residue of the income be divided equally between his three children, and that in the event of the death of "either" of them "their share to go to the children surviving, if they have no issue, the share to go to my own children surviving or to their surviving children, to be shared equally between them."

**WILL — Continued.**

It was further provided that his estate "shall not be divided until 25 years from date of will, providing my wife Clara is not living." He further directed "that if any of my said children shall die childless her share of the estate shall be equally divided between my surviving children, or their respective heirs." Provisions of the will examined, and

*Held*, that the only provision with respect to the disposition of the income of the estate is during the life of the wife of the testator;

That other provisions by which the testator attempted to suspend the division of his estate for the period of twenty-five years unlawfully suspended the power of alienation, and are invalid;

That the fee vested absolutely in the three daughters as tenants in common at the death of the widow. *Goldsmith v. Haskell*, 510.

6. *Will — probate — "examination" of subscribing witnesses — reason for admitting will to probate contrary to testimony of subscribing witnesses.* Under section 2611 of the Code of Civil Procedure, providing that "Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined; if so many are within the State, and competent and able to testify," an "examination" contemplates such a particular inquiry into the facts and circumstances surrounding the execution as is calculated to satisfy the surrogate that the will is genuine, and that it was validly executed. Merely asking a witness to identify his signature is not a sufficient compliance with the Code.

The mere fact that such witness was recalled before the trial was concluded at the instance of a special guardian, and asked certain questions which had nothing to do with the *factum* of the will, did not constitute a sufficient examination.

Furthermore, it was an abuse of discretion not to permit said witness to be recalled for cross-examination, as it would have been unjust to compel the contestants to make him their own witness.

The reason for providing that two subscribing witnesses must be produced and examined before a will is admitted to probate is that the surrogate may be satisfied by proof that the requirements of law were observed in the execution and publication of the instrument.

When two witnesses are available, both must testify to the publication of the will by the testator, and that they signed it at his request, although it has been held that not every fact concerning the due execution of the will need be testified to by each witness.

The reason for permitting a will to be admitted contrary to the testimony of the subscribing witnesses, where the court is satisfied that it was properly executed is, that otherwise a premium would be put on the "holding up" of an estate under threat by the witness to testify against due execution. *Matter of Huber*, 635.

7. *Testamentary trust — when corporate stock constitutes a part of corpus of trust and is not income.* At the creation of a testamentary trust by which testator directed that certain shares of the stock of an oil company should be held by his son in trust for testator's widow, all of the stock of two subsidiary companies constituted a part of the capital of the oil company and was delivered by it to its stockholders including the testamentary trustee. Subsequently the pipe line property of the subsidiary companies was sold for the stock of other companies and it was delivered to the stockholders of the subsidiary companies. *Held*, that such of said stock as was received by the testamentary trustee was principal belonging to the corpus of the trust fund and not payable to testator's widow. *Matter of Megrue*, 747.

8. *Latent ambiguity in describing beneficiary — parol evidence to identify intended legatee — costs — discretion of Surrogate's Court.* Where a testator in a will hastily prepared bequeathed a certain sum to "Jennie Spenceley and \$5,000 to Albert Spenceley, the children of my brother Martin Spenceley," and it appears that Jennie Spenceley is the daughter of another brother, William Spenceley, and had lived with deceased many years, and that the name of the daughter of Martin Spenceley is Jane Ida Elizabeth Victoria Lloyd, and that she resides in Canada, said facts show a latent ambiguity, permitting the admission of parol evidence to identify the intended legatee.

Although costs are ordinarily in the discretion of the Surrogate's Court, an order, imposing full trial costs on a niece who was brought in by citation

**WILL — Continued.**

and appeared and contested an issue which had arisen through haste in making and executing the will, will be modified by striking out said costs. *Matter of Van Vliet*, 879.

Fraud and undue influence. *Matter of Chapman*, 881.

**WORKMEN'S COMPENSATION LAW.**

1. *Death caused by person not employer — election of remedies — Workmen's Compensation Law, section 29, construed — widow may elect for minor child — subrogation to action against wrongdoer — administration not essential.* Under section 29 of the Workmen's Compensation Law relating to an election of remedies where an employee is killed by the wrongful act of another not in the same employ, and allowing the dependents to elect whether to take compensation from the employer under the statute, or to pursue the remedy against the wrongdoer, and providing for an assignment of the claim against the wrongdoer if the dependents elect to take under the statute, the widow of the decedent may elect, not only for herself but for her minor child, to take under the statute.

When she has so elected and has received the award made to herself and child, the employer or the State, as the case may be, is subrogated to the right of action against the wrongdoer, and such action cannot thereafter be brought on behalf of said dependents.

The above rule was in force by implication even before section 29 was amended by chapter 622 of the Laws of 1916, so as to give in express terms to a parent or guardian the right to elect for a minor.

A widow need not have been appointed administratrix of her husband's estate in order to make such election for herself and child. *Hanke v. New York Consolidated R. R. Co.*, 53.

2. *Jurisdiction of State Industrial Commission to make award for medical services paid by employee — request to employer to furnish medical services prerequisite to validity of claim by employee therefor.* The State Industrial Commission has jurisdiction under the Workmen's Compensation Law to make an award to an injured employee for a payment by him for medical services rendered to him within sixty days after an injury sustained in the service of his employer.

It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer.

Under section 13 of the Workmen's Compensation Law, a request to the employer to furnish medical services is a prerequisite to the validity of a claim by the employee therefor. *Goldstam v. Kazemier & Uhl, Inc.*, 140.

3. *Death of employee from heart trouble resulting from lifting of heavy weight — evidence favoring presumption of validity of claim — notice of injury — excuse for failure to serve notice — time of service.* The Industrial Commission is justified in finding that claimant's husband while lifting a heavy weight in the course of his employment, suffered a strain which caused a dilatation of the heart muscle, resulting in his death, where a fellow-workman testified in effect that the deceased after lifting the heavy weight stopped work and said that he "had a pain," and on the following day a physician diagnosed his trouble as heart difficulty, and his wife testified that he never complained of illness before, for the evidence favors the presumption of the validity of the claim created by section 21 of the Workmen's Compensation Law.

The fact that a factory superintendent heard of an accident within ten days is insufficient to excuse the failure of the employee to serve the written notice of injury required by section 18 of the Workmen's Compensation Law.

The statute requires the notice of injury to be given within ten days after "disability," not within ten days after the injury.

Where it appears that an employee continued regularly in the discharge of his duties until the date of his disability and died within ten days thereafter, and that within thirty days after his death notice of the injury was given, the statute is complied with. *Gibbons v. Marx & Rawolle, Inc.*, 142.

4. *Method of determining average annual earnings and average weekly wages where claimant has worked seven days a week during year before accident — Workmen's Compensation Law, section 14, construed.* In subdivisions 1 and 2 of section 14 of the Workmen's Compensation Law, providing that in

**WORKMEN'S COMPENSATION LAW — Continued.**

cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary, the number 300 was selected because it bears an approximately close relation to the number of working days in the year, Sundays and holidays excluded.

But where an employee has worked seven days a week for substantially the entire year, the method of determining his average earnings indicated in either subdivision 1 or 2 would be an injustice to him, and his claim falls within subdivision 3 which provides for a case where "either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied."

Where the Commission has ascertained that in a case where an employee has worked seven days a week for the entire year, the use of the number 332 instead of 300 effects a fair and reasonable result, the method used is protected by the statute. *Prentice v. New York State Railways*, 144.

5. *Adopted child not an heir at law and next of kin of father of adopting parent — such child not entitled to award upon death of father of adopting parent — Domestic Relations Law, section 114, construed.* A legally adopted child of the daughter of a deceased employee, who was dependent upon him at the time of the accident, is not an heir at law and next of kin of the deceased, so as to be entitled to an award under the Workmen's Compensation Law.

Under section 114 of the Domestic Relations Law, an adopted child by reason of such adoption does not become an heir at law and next of kin of the father of its adopting parent. *Winkler v. New York Car Wheel Co.*, 239.

6. *Plasterer injured while repairing plaster in apartment house for owner and operator thereof, not entitled to an award.* A plasterer employed by the hour by the owner and operator of an apartment house to repair the plaster, who was injured while so engaged on October 8, 1916, is not entitled to an award under the Workmen's Compensation Law, as it existed on the date of the injury. *Solomon v. Bonis*, 672.

*Lifting heavy weights — rupture. Matter of Alpert*, 902.

*Verbal notice of accident. Matter of Berisso*, 958.

*Insufficient notice. Matter of Gordon*, 959.

*Junk dealers — storing bottles — hazardous employment. Matter of Kronberger*, 900.

**YONKERS, CITY OF.**

*City judge — appointment by mayor.*

*See COURT.*

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